DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-556
Title: Maetta Vance, Petitioner
v.
Ball State University, et al.
Docketed: November 2, 2011
Linked with 11A192
Lower Ct: United States Court of Appeals for the Seventh Circuit
Case Nos.: (08-3568)
Decision Date: June 3, 2011
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Aug 10 2011	Application (11A192) to extend the time to file a petition for a writ of certiorari from September 1, 2011 to October 31, 2011, submitted to Justice Kagan.
Aug 16 2011	Application (11A192) granted by Justice Kagan extending the time to file until October 31, 2011.
Oct 31 2011	Petition for a writ of certiorari filed. (Response due December 2, 2011)
Nov 15 2011	Order extending time to file response to petition to and including January 3, 2012.
Dec 13 2011	Order further extending time to file response to petition to and including January 17, 2012.
Jan 17 2012	Brief of respondent Ball State University in opposition filed.
Jan 31 2012	Reply of petitioner Maetta Vance filed.
Feb 1 2012	DISTRIBUTED for Conference of February 17, 2012.
Feb 21 2012	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
May 24 2012	Brief amicus curiae of United States filed.
Jun 4 2012	Supplemental brief of petitioner Maetta Vance filed.
Jun 5 2012	DISTRIBUTED for Conference of June 21, 2012.
Jun 25 2012	Petition GRANTED.
Jul 17 2012	The time to file the joint appendix and petitioner's brief on the merits is extended to and including August 29, 2012.
Jul 17 2012	The time to file respondents' brief on the merits is extended to and including October 19, 2012.
Jul 26 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Aug 1 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.

Aug 29 2012	Joint appendix filed.
Aug 29 2012	Brief of petitioner Maetta Vance filed.
Sep 5 2012	Brief amicus curiae of United States in support of neither party filed.
Sep 5 2012	Brief amici curiae of National Employment Lawyers Association and AARP filed.
Sep 5 2012	Brief amici curiae of National Partnership for Women & Families, et al. filed.
Sep 14 2012	SET FOR ARGUMENT ON Monday, November 26, 2012.
Sep 14 2012	CIRCULATED
Sep 26 2012	Record from U.S.C.A. for 7th Circuit is electronic.
Sep 26 2012	The record from the U.S.D.C. for the Southern District of Alabama is electronic.
Oct 19 2012	Brief of respondents Ball State University, et al. filed. (Distributed)
Oct 25 2012	Brief amicus curiae of American Council on Education, et al. filed.
Oct 26 2012	Brief amici curiae of Society for Human Resource Management, et al. filed. (Distributed)
Oct 26 2012	Brief amicus curiae of Equal Employment Advisory Council filed. (Distributed)
Oct 26 2012	Brief amici curiae of National Federation of Independent Business Small Business Legal Center, et al. filed. (Distributed)
Oct 26 2012	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Oct 26 2012	Brief amicus curiae of Chamber of Commerce of the United States of America filed. (Distributed)
Oct 26 2012	Brief amicus curiae of New England Legal Foundation filed. (Distributed)
Oct 26 2012	Brief amicus curiae of National Retail Federation filed. (Distributed)
Nov 13 2012	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Nov 13 2012	Reply of petitioner Maetta Vance filed. (Distributed)
Nov 26 2012	Argued. For petitioner: Daniel R. Ortiz, Charlottesville, Va. For United States, as amicus curiae: Sri Srinivasan, Deputy Solicitor General, Department of Justice, Washington, D. C. For respondents: Gregory G. Garre, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

RECORD AND BRIEFS

No. 11-550

OCT 31 2011

OFFICE OF THE CLERK

In the Supreme Court of the United States

MAETTA VANCE,

Petitioner,

v.

BALL STATE UNIVERSITY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), this Court held that under Title VII, an employer is vicariously liable for severe or pervasive workplace harassment by a supervisor of the victim. If the harasser was the victim's co-employee, however, the employer is not liable absent proof of negligence. In the decision below, the Seventh Circuit held that actionable harassment by a person whom the employer deemed a "supervisor" and who had the authority to direct and oversee the victim's daily work could not give rise to vicarious liability because the harasser did not also have the power to take formal employment actions against her. The question presented is:

Whether, as the Second, Fourth, and Ninth Circuits have held, the *Faragher* and *Ellerth* "supervisor" liability rule (i) applies to harassment by those whom the employer vests with authority to direct and oversee their victim's daily work, or, as the First, Seventh, and Eighth Circuits have held (ii) is limited to those harassers who have the power to "hire, fire, demote, promote, transfer, or discipline" their victim.

PARTIES TO THE PROCEEDING

In addition to the party identified in the caption, respondent-appellees also include William Kimes, Individually and in his Official Capacity as General Manager of Ball State University's Banquet and Catering Department; Saundra Davis, Individually and in her Official Capacity as a Supervising Employee of Ball State University's Banquet and Catering Department; Karen Adkins, Individually and official capacity as the Assistant Director of Administration, Personnel, and Marketing for the Residence Hall Dining Service at Ball State University; and Connie McVicker, Individually.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Seventh Circuit, App., *infra*, 1a, is reported at 646 F.3d 461. The district court's unpublished memorandum and order granting the respondent's motion for summary judgment, App., *infra*, 25a, is available at 2008 WL 4247836.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 2011. On August 16, Justice Kagan granted an extension of time to file a petition for a writ of certiorari until October 31. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964 provides in pertinent part:

> It shall be an unlawful employment practice for an employer—
>
> > (a) to fail or refuse to hire or to discharge any individual, or to otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

42 U.S.C. § 2000e-2(a).

The Equal Employment Opportunity Commission ("EEOC") guidelines provide in pertinent part:

> An individual qualifies as an employee's "supervisor" if:

- the individual has authority to undertake or recommend tangible employment decisions affecting the employee; or
- the individual has authority to direct the employee's daily work activities.

Equal Emp't Opportunity Com'n, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (1999), 1999 WL 33305874, App., *infra*, 81a.

STATEMENT

In *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), this Court held that when an employee subject to severe or pervasive sex- (or race-) based workplace harassment sues her employer under Title VII, the employer is vicariously liable for the discriminatory conduct of the worker's "supervisors," but that liability for harassment by a "co-employee" requires proof of employer negligence. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

Since then, the lower federal courts have staked out starkly divergent rules for when the *Faragher* and *Ellerth* vicarious liability rule applies. Following circuit precedent, the decision below held that it applies only to a subset of supervisors, those with authority to alter the victim's formal employment status, *i.e.*, to hire, fire, promote, or discipline, and that an individual who has the title of manager, functions as the plaintiff's boss, oversees her work, and assigns her daily tasks is, for these purposes, a mere "co-worker." While two other federal courts of appeals have adopted the Seventh

Circuit's rule, three others, along with numerous district courts and the United States Equal Employment Opportunity Commission, have squarely rejected it. Those courts (and the EEOC) have concluded that the restriction is unsupported by—and indeed irreconcilable with—the holding and reasoning of *Faragher* itself and, in the words of a Seventh Circuit judge, at odds with the concern for "workplace reality" that has been a touchstone of this Court's Title VII case law.

The Court should grant review here to settle the acknowledged conflict over this important question of federal law and correct the entrenched but spurious misreading of *Faragher* and *Ellerth*.

A. Statutory Background

Title VII protects employees from, *inter alia*, workplace discrimination on the basis of race or sex. 42 U.S.C. § 2000e-2(a). In *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57 (1986), this Court first recognized that sex-based harassment in the workplace is actionable under Title VII. *Id.* at 67.[1] The Court explained, "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." *Id.* at 66. In *Harris* v. *Forklift Systems, Inc.*, 510

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[1] Although *Meritor* and subsequent cases involved sex-based discrimination, it explained that lower "[c]ourts [had] applied this principle to harassment based on race * * * [and] [n]othing in Title VII suggests that a hostile environment based on discriminatory *sexual* harassment should not be likewise prohibited." 477 U.S. at 66; accord *Ellerth*, 524 U.S. at 767-768.

U.S. 17 (1993), and *Oncale* v. *Sundowner Offshore Services*, 523 U.S. 75 (1998), the Court laid out the principal requirements for a hostile work environment claim: (1) that the race- or gender-based harassment be "severe or pervasive"; (2) that a reasonable person in the plaintiff's position would find the environment either hostile or abusive; and (3) that the plaintiff perceived it as such. *Harris*, 510 U.S. at 21-22.

In *Faragher* and *Ellerth*, the Court considered the standards that should govern "employer responsibility" in such cases. The Court established three distinct rules. First, for cases where a supervisor's harassment of a subordinate is accompanied by a tangible adverse employment action, the Court held, in agreement with most of the lower courts, that strict liability should apply. *Faragher*, 524 U.S. at 790-791; *Ellerth*, 524 U.S. at 762-763. Second, for cases where no tangible action is taken and the harassing employee is the victim's co-worker, the Court likewise endorsed the view of most lower courts—that employer liability requires proof of negligence, a combination of "knowledge and inaction." *Faragher*, 524 U.S. at 789, 806-807; *Ellerth*, 524 U.S. at 760.

Third, and most notably, the Court held that a different rule governs when no tangible adverse action was taken but the harassment was that of the victim's "supervisor." *Faragher*, 524 U.S. at 807-808; *Ellerth*, 524 U.S. at 764-765. Rejecting lower court decisions that had imposed a negligence standard, the Court looked to the agency principles that Congress intended to inform Title VII generally, and, in particular, the "aided in authority" principle of the

Restatement (Second) of Agency § 219 (1957), and explained, "a harassing supervisor is always assisted in his misconduct by the supervisory relationship." *Faragher*, 524 U.S. at 802. Accordingly, in the absence of "tangible employment action," *id.* at 806, employers are "subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over [her]"—but allowed to make out an affirmative defense "compris[ing] two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer." *Ibid.*

B. Facts and Proceedings Below[2]

This case arises from a decision of the Seventh Circuit holding, as a matter of law, that the employer respondent here, Ball State University, could not be liable for the racial harassment and intimidation to which petitioner Maetta Vance, the sole African-American employee in the University's

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[2] Because this case was decided on motions for summary judgment, the courts below were required (as this Court would be) to "draw all reasonable inferences in favor of the nonmoving party," *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); to disregard any evidence supporting Ball State that the jury would not be required to credit; and to refrain from "mak[ing] credibility determinations or weigh[ing] the evidence." *Ibid.*

Banquet and Catering Department, was subjected in her workplace.

In 2005 Saundra Davis, a salaried employee whom Ball State designated as a "supervisor," was assigned to the Catering Department and given authority to direct Vance's and other employees' work. App., *infra*, 54a. During a previous stint in the department, Davis had physically assaulted Vance, who had reported it to her supervisor at the time, but did not pursue a formal complaint when Davis was transferred out. *Id.* at 18a.

Davis and Connie McVicker, another white employee, created an environment of physical intimidation and racial harassment. Davis threatened Vance, cornering her on an elevator and telling her, "I'll do it again." App., *infra*, 30a. She used epithets like "Buckwheat" and "Sambo" to refer to Vance and felt comfortable doing so in the presence of Vance and other employees. *Id.* at 6a. For her part, McVicker regularly used the term "n****r" to refer to both Vance and African-American students at the University and openly boasted of her family's connections to the Ku Klux Klan. *Id.* at 3a. Both Davis and McVicker stared menacingly at Vance, leaving her afraid to be alone with them in the kitchen. *Id.* at 37a n.8.

As this behavior persisted, Vance lived and worked in a constant state of fear. She sought psychiatric treatment for anxiety and sleeplessness. Pet. Summ. J. Br. 7-8 (No. 1:06-cv-1452-SEB-JMS). The University's incident reports described Vance as "sitting on the edge of her seat" and "shaking violently" as she recounted her treatment by Davis

and McVicker. Pet. Summ. J. Br. Exh. 10 (No. 1:06-cv-1452-SEB-JMS).

When Vance reported particular instances of the harassment to the University's Compliance Office, that office repeatedly assigned Bill Kimes, the general manager of Vance's department, to investigate. Kimes had himself long mistreated Vance. The first time she had introduced herself to him, Kimes had refused to shake Vance's hand. App., *infra*, 3a. Kimes also regularly excluded Vance from workplace activities, waiting until she left to invite her white coworkers to lunch. *Ibid.* Indeed, respondents expressly conceded that Kimes was abusive, telling the Seventh Circuit that he was "very, very rude" and "ruled by intimidation." Resp. C.A. Br. at 6. They denied only that he singled out Ms. Vance for particularly harsh treatment. *Ibid.*[3]

Little was done as the result of Kimes's "investigations." Kimes never imposed discipline on Davis (who denied Vance's account of the elevator incident), instead counseling both Davis and Vance to "respect" each other in the workplace. App., *infra*, 6a. After numerous white employees corroborated Vance's reports about McVicker's racist tirades, the University issued McVicker, whom they concluded had repeatedly lied to investigators, a (confidential) letter of reprimand. *Id.* at 16a. Because the University had no formal policy concerning racial

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[3] Petitioner presented evidence—sworn statements of fellow employees—that Kimes's abuse of Vance in fact was worse than his mistreatment of the nonminority employees the University identified. Pet. C.A. Br. at 11.

harassment—unlike a lengthy and detailed "zero tolerance policy" addressed to sex-based harassment, Pet. C.A. Br. at 12—McVicker's letter referenced a generic rule prohibiting "conduct which is inconsistent with proper behavior." App., *infra*, 34a. Although the University had responded forcefully to previous incidents of gender- and sexual-orientation harassment, Pet. Summ. J. Br. 5 (No. 1:06-cv-1452-SEB-JMS), the University refused Vance's request that McVicker be assigned to another department and continued to schedule them to work together—though later explaining that Kimes had "tried" to avoid doing so. *Id.* at 36a.

Although the reprimand letter indicated that McVicker risked more serious sanctions if she continued to direct racist epithets at Vance, she called Vance a "monkey" the day the letter was issued. When Vance reported this to Kimes, he discouraged her from "proceeding further" with a complaint, explaining that a "she said-she said exchange * * * wouldn't result in anything positive." App., *infra*, 35a. This concern for corroboration did not obtain when Vance was accused: when Davis alleged that Vance had splashed pots and pans in her presence, Kimes issued Vance a verbal warning without further investigation. *Id.* at 8a. Indeed, email exchanges obtained in discovery showed University "investigators" fretting over whether Vance would enlist the aid of the NAACP or the Urban League or would form an "alliance" with other African-American employees. Pet. Summ. J. Br. Exh. 14 (No. 1:06-cv-1452-SEB-JMS).

The harassment did not abate even after Vance complained to the EEOC or after this action was

filed. Davis approached Ms. Vance, taunting her and saying, in a Southern accent, "you scared?" App, *infra*, 7a. Nor did McVicker relent: she cornered Vance and said, "payback." *Id.* at 37a. Still later (after motions had been filed), Davis and her daughter accosted Vance on the University campus, with the daughter saying: "You are a n****r, a f***ing n****r. You are trying to get my mother fired. What are you gonna do about it? I'll kick your ass." *Id.* at 44a. When Vance told Kimes about her encounter with Davis and her family, he told Vance to "get out of [his] face," *id.* at 45a, and did nothing.

When the University's newspaper posted articles describing Vance's lawsuit on its website, it occasioned numerous overtly racist and threatening comments. One commenter wrote that Vance should go "back to the east side and sell some crack," and another suggested that Davis should "[b]ait [Vance] into a physical altercation, make sure others see her strike you first, then beat that loudmouth down, in self-defense." App., *infra*, 46a n.13. The University kept these offensive messages on the website after petitioner asked that they be taken down.

Vance sued, alleging hostile environment and retaliation claims under Title VII.[4] The district court granted Ball State's motion for summary judgment, concluding, *inter alia*, that the evidence

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[4] The retaliation claim, which arose, *inter alia*, from the increasingly unpleasant and menial work assignments Vance was given after complaining, was dismissed below, and is not the subject of this petition.

raised no triable issue as to Title VII employer responsibility for Vance's work environment.

The court first concluded that, whether or not Davis "had authority to direct the work of [Vance and] other employees," App., *infra*, 54a, she lacked what the Seventh Circuit precedent established to be the *sine qua non* of "supervisor" status under *Farager* and *Ellerth*, "the power to hire, fire, demote, promote, transfer, or discipline an employee." *Id.* at 53a (citing *Hall* v. *Bodine Elec. Co.*, 276 F.3d 345, 355 (7th Cir. 2002)). The court then held that as a matter of law Vance's claim could not succeed under the negligence standard applicable to co-employee harassment.

In so holding, the court addressed a dispute between the parties as to whether evidence of post-filing incidents, such as the assault by the Davis family and the comments on the newspaper website, were properly before it. After expressly stating that "even if [the court] were to consider the allegations set forth by Ms. Vance in her supplemental submissions, they would have no effect on our ultimate determination that she is unable to survive summary judgment on her hostile environment claim," App., *infra*, 51a, the court agreed with Ball State that the submissions should be disregarded for failure to comply with Fed. R. Civ. P. 15(d), the rule governing supplemental pleadings.

The Seventh Circuit affirmed the judgment. The court assumed that Vance had carried her burden with respect to three of the four elements of her hostile environment claim: "(1) that [the employee's] work environment was both objectively and

subjectively offensive; (2) that the harassment was based on her race; and (3) that the conduct was either severe or pervasive." App., *infra*, 11a. But the Seventh Circuit upheld the district court as to the sufficiency of the "basis for employer liability." *Ibid.*

The court rejected the argument that Davis's conduct should attributed to Ball State under the *Faragher/Ellerth* standard, explaining that circuit precedent limited that rule to harassment by supervisors with the "authority * * * 'to hire, fire, demote, promote, transfer, or discipline [their victim].'" App., *infra*, 12a (quoting *Hall*, 276 F.3d at 355). The opinion acknowledged that this restrictive rule had been rejected by other circuits and the EEOC's Enforcement Guidance and had been subject to criticism within the Seventh Circuit. *Ibid.* But the court explained that it was nonetheless binding law in the circuit.

As to negligence, the court upheld the lower court's conclusion, but identified two errors in its analysis. The court first explained that the district court had erred in considering the harassment evidence against Davis and McVicker separately, emphasizing "that a hostile work environment claim requires a consideration of all the circumstances, because in the end it is the employer's liability that is at issue, not liability of particular employees." App., *infra*, 14a. Again emphasizing that a hostile work environment claim is premised on the "cumulative effect of individual acts," *National R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 115 (2002), the court also rejected the conclusion that the post-filing evidence could be treated as "a disguised Rule

15(d) submission." App., *infra*, 9a. Despite this, the court declined to remand, observing that the district court had discretion to exclude the evidence "in the interest of keeping [the case] moving forward." *Id.* at 10a-11a.

REASONS FOR GRANTING THE PETITION

This case squarely presents a recurring and consequential question of federal law: whether *Faragher's* and *Ellerth's* rule that employers are vicariously liable under Title VII when "supervisors" engage in race- or sex-based workplace harassment applies only to misconduct by personnel who have power over their victim's formal terms of employment. Adhering to circuit precedent, the court below so held. In doing so, however, the court acknowledged that other courts and the EEOC reject this rule. App., *infra*, 12a-13a. This Court should review the decision to settle this broad and entrenched conflict and correct the Seventh Circuit's significant misreading of *Faragher* and *Ellerth*.

I. THE LOWER COURTS ARE SHARPLY DIVIDED AS TO WHEN THE FARAGHER/ELLERTH VICARIOUS LIABILITY RULE APPLIES

Although *Faragher* and *Ellerth* announced that significantly different rules should apply to discriminatory harassment by "supervisors" and "co-employees" (and held the cases before the Court governed by the "supervisor" rule), they did not define "supervisor" or explicitly instruct lower courts as to when vicarious liability is triggered. "The definition of the term 'supervisor' for Title VII purposes is a question that has divided the courts."

Browne v. *Signal Mountain Nursery, L.P.*, 286 F. Supp. 2d 904, 912 (E.D. Tenn. 2003); accord App., *infra*, 12a-13a (acknowledging circuit split); *Griffin* v. *Harrisburg Property Servs., Inc.*, 421 Fed. Appx. 204, 208 n.6 (3d Cir. 2011) (same); *Joens* v. *John Morrell & Co.*, 354 F.3d 938, 940 (8th Cir. 2004) (same). The Seventh Circuit and others have held that only a subset of supervisors—those with the power over the formal employment status of the subordinate they harass—are governed by the *Faragher/Ellerth* rule. Other courts have expressly rejected that restriction as incompatible with the result and reasoning of this Court's decisions and have instead held that the *Faragher/Ellerth* rule governs when the harasser has authority to direct and oversee his victim's daily tasks, irrespective of whether he is empowered to take ultimate action on the company's behalf. This split is sharp and widespread and shows no sign of abating.

A. Three Circuits Have Held The "Supervisor" Rule Is Restricted To Harassment By Those With Power Over Their Victim's Formal Employment Status

Six months after *Faragher* and *Ellerth*, the Seventh Circuit gave their rule a restrictive reach, holding that employers would be vicariously liable only for race or sex harassment by those supervisors possessing authority of "a certain magnitude" over their victim's employment terms, namely to make "consequential employment decisions," "primarily * * * the power to hire, fire, demote, promote, transfer, or discipline [him or her]." *Parkins* v. *Civil Constructors of Illinois, Inc.*, 163 F.3d 1027, 1034-

1035 (7th Cir. 1998). Although the *Parkins* opinion was somewhat unclear about how restrictive it meant this "supervisor" definition to be, subsequent Seventh Circuit decisions have relied on it to hold that a harasser who directed the victim's daily work was merely a "co-employee." In *Hall* v. *Bodine Electric Co.*, the court declared that "the fact that an employer authorizes one employee to oversee aspects of another employee's job performance does not establish a Title VII supervisory relationship." 276 F.3d at 355; see also *Rhodes* v. *Illinois Dept. of Transp.*, 359 F.3d 498, 506 (7th Cir. 2004). These decisions make clear that only harassment by an individual who has power over the formal employment status of his or her victim implicates the vicarious liability rule.

In published opinions, the First and Eighth Circuits have adopted this "power over formal employment status" view, see *Noviello* v. *City of Boston*, 398 F.3d 76, 96 & n.5 (1st Cir. 2005) (rejecting the "broader" Second Circuit definition); *Joens* v. *John Morrell & Co.*, 354 F.3d 938, 940 (8th Cir. 2004) (affirming district court's adoption of "the narrower standard of *Hall*"), as have the Third and Sixth Circuits in unpublished opinions, see *Griffin* v. *Harrisburg Property Servs., Inc.*, 421 Fed. Appx. 204, 209 (3d. Cir. 2011); *Stevens* v. *U.S. Postal Serv.*, 21 Fed. Appx. 261, 263-264 (6th Cir. 2001), and numerous district courts.[5]

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[5] See, *e.g.*, *Browne*, 286 F. Supp. 2d at 912-918; *McPherson* v. *HCA-HealthOne, LLC.*, 202 F. Supp. 2d 1156, 1169 (D. Colo. 2002); *Olsen* v. *H.E.B. Pantry Foods*, 196 F. Supp. 2d 436, 439 (E.D. Tex. 2002).

While acknowledging that the basis for *Faragher/Ellerth's* vicarious liability rule is that "acts of supervisors have greater power to alter the environment than acts of co-employees generally," *Parkins*, 163 F.3d at 1033 (quoting *Faragher*, 524 U.S. at 805), these courts have emphasized the need to exclude "low level supervisors" and those with only nominal supervisory roles, reasoning that only authority of a "substantial magnitude" can be said to aid in the commission of harassment. *Ibid.* In drawing this line, these courts have looked to pre-*Faragher/Ellerth* cases addressing whether a manager was the employer's "agent," which had limited that status to those empowered to make "consequential decisions" about the victim's employment status and concluded that the same test—whether the harasser has authority to affect the "hire, fire, demote, promote, transfer, or discipline" the victim—should determine vicarious liability. *Id.* at 1034. "Without some modicum of this authority, a harasser cannot qualify as a supervisor" under *Faragher* and *Ellerth*. *Noviello*, 398 F.3d at 96.

B. Three Circuits And The EEOC Have Rejected The Seventh Circuit's Rule

The Second, Fourth, and Ninth Circuits, the Tenth Circuit in an unpublished opinion, and district courts of the Fifth and Eleventh Circuits have rejected the Seventh Circuit's restrictive rule, holding that harassment by personnel overseeing the victim's daily work assignments and performance, not just power over her formal employment status, warrants vicarious employer liability. In *Mack* v. *Otis Elevator Co.*, 326 F.3d 116 (2d Cir.), cert.

denied, 540 U.S. 1016 (2003), the Second Circuit became the first court of appeals to reject *Parkins*. Holding vicarious employer liability warranted for harassment committed by a "mechanic in charge" who "exercised the authority to make and oversee the daily work assignments of the mechanics and the mechanics' helpers," the court concluded that the Seventh Circuit's rule, simply focusing on "whether the employer gave the employee the authority to make economic decisions concerning his or her subordinates," was too narrow. *Id.* at 126. Citing guidelines on the subject issued by the EEOC as persuasive authority, the *Mack* court held that the proper inquiry under *Faragher* and *Ellerth* is "whether the authority given by the employer to the employee enabled or materially augmented the ability of the latter to create a hostile work environment for his or her subordinates." *Id.* at 126-127.

The Fourth Circuit too has rejected *Parkins*. In *Whitten* v. *Fred's, Inc.*, 601 F.3d 231 (4th Cir. 2010), that court announced that "the absence of the ability to take tangible employment actions does *not* foreclose the possibility that the harasser is the plaintiff's supervisor." *Id.* at 234 (emphasis in original). The court then concluded that vicarious liability governed, because the harasser "directed [the victim's] activities, giving her a list of tasks he expected her to accomplish" and "controlled her schedule." *Id.* at 246 (citing *Mack* favorably).[6]

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[6] Although some courts and commentators had read language in an earlier Fourth Circuit decision, *Mikels* v. *City of Durham*, 183 F.3d 323 (4th Cir. 1999), as placing

The Ninth Circuit's definition of supervisor parallels that of the Second and Fourth Circuits. In *McGinest* v. *GTE Service Corp.*, 360 F.3d 1106, 1119 n.13 (9th Cir. 2004), the court held that "the authority to demand obedience from an employee" makes a harasser a supervisor under *Faragher/Ellerth*. Relying on *McGinest*, the court in *Dawson* v. *Entek International*, 630 F.3d 928, 937 (9th Cir. 2011), held that a "trainer and immediate manager" of the victim could be a supervisor, even if the employer did not vest him with authority over the victim's formal employment status. See *id.* at 940.

In an unpublished opinion, the Tenth Circuit implicitly adopted the "power to direct" approach as well. *Smith* v. *City of Oklahoma City*, 64 Fed. Appx. 122, 127 (10th Cir. 2003). There, the court held that "[b]ecause [the harasser] directed [the victim's] daily tasks * * * a reasonable jury could conclude that [he] was [her] supervisor." District courts of the Fifth and Eleventh Circuits have also followed this approach. See *Anderson* v. *Ultraviolet Sys., Inc.*, No. Civ.A.H-03-2873, 2005 WL 1840155, at *7 (S.D. Tex. July 25, 2005); *Dinkins* v. *Charoen Pokphand USA, Inc.*, 133 F. Supp. 2d 1254, 1266 (M.D. Ala. 2001).

These courts have observed that restricting vicarious liability to harassment by those with power over their victim's formal employment status "would

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that court on the "power over formal employment status" side of the divide, see, *e.g.*, *Mack*, 326 F.3d at 126 n.5, the subsequent holding in *Whitten* forecloses that interpretation.

be inconsistent with the outcome in *Faragher*," because one of the lifeguards deemed a supervisor by this Court in that case plainly lacked such power. *Whitten*, 601 F.3d at 245 n.6. And a supervisor without hiring or firing authority, these courts reason, can still possess the "power and authority that [make the victim] vulnerable to his conduct 'in ways that comparable conduct by a mere co-worker [does] not.'" *Id.* at 246 (quoting *Mikels*, 183 F.3d at 333). Accordingly, "the authority that renders a person a supervisor for purposes of Title VII analysis is broader than that reflected in the *Parkins* test." *Mack*, 326 F.3d at 126.

As these courts have also recognized, their interpretation is consistent with that of the EEOC, the agency vested with significant responsibility for enforcing Title VII, educating employers about their statutory obligations, investigating Title VII complaints, and promoting their consensual resolution. In this capacity, the EEOC issues guidelines interpreting Title VII, which are "entitled to great deference." *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 94 (1973). These "'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 142 (1976) (quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)). Indeed, this Court expressly relied on the EEOC Guidelines in holding in *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57, 65 (1986), that harassment is a prohibited form of discrimination.

For more than a decade, the EEOC has understood "supervisor" in *Faragher* and *Ellerth* to include one who "has authority to direct the

employee's daily work activities." App, *infra*, 90a. Like the courts that have rejected the Seventh Circuit definition, the EEOC explains that because an individual's harassment and abuse of a subordinate is bolstered by authority over her work assignments and performance, the harassing individual should be treated as a supervisor, not a mere co-employee. *Id.* at 91a-92a.

The EEOC has filed briefs successfully urging courts of appeals to reject the "artificially limited" Seventh Circuit rule. EEOC Amicus Br. at 22, *Whitten*, 601 F.3d 231 (No. 09-1265); EEOC Amicus Br., *Mack*, 325 F.3d 116 (No. 02-7056); EEOC Amicus Br., *Weyers* v. *Lear Operations Corp.*, 359 F.3d 1049 (8th Cir. 2004) (No. 02-3732). The *Mack* and *Whitten* courts were both persuaded by the EEOC.[7]

Although the Seventh Circuit continues to reject the EEOC's understanding of *Faragher*, App., *infra*, 13a, its restrictive definition of "supervisor" has been the subject of internal criticism. In *Rhodes*, a panel held that circuit precedent required that sexual harassment by personnel responsible for "assembling crews and assigning tasks to employees," be treated under the co-worker rule, because they lacked the power to "hire, fire, transfer, promote, demote, or discipline" the victim or other employees. *Id.* at 502, 506. This outcome led two members of the three-

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[7] The Eighth Circuit in *Weyers* was foreclosed from adopting the EEOC's definition by *Joens* v. *John Morrell & Co.*, 354 F.3d 938 (8th Cir. 2004), decided one month earlier. *Weyers*, 359 F.3d at 1056-1057.

judge panel to urge reconsideration of *Parkins*. *Rhodes*, 359 F.3d at 509-510. One criticized the Seventh Circuit's definition as "particularly narrow" and doubted that it "comport[ed] with the realities of the workplace." *Ibid.* (Rovner, J., concurring).

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The circuits are openly and deeply divided over the proper definition of supervisor and the domain for the vicarious liability rule. A harasser who directs and oversees the work of the victim but who lacks power over her formal employment status is a supervisor in some circuits but not in others.

II. THE SEVENTH CIRCUIT RULE IS WRONG

The Seventh Circuit has restricted the *Faragher* and *Ellerth* liability rule to harassment by only a subset of the individuals who are "supervisors" in common parlance—and in the eyes of their subordinates and employers—by excluding those with immediate responsibility for directing the day-to-day work of their victims unless they also have power to take "consequential employment" action against them. This arbitrary restriction of *Faragher* and *Ellerth* is unsupported by—and indeed contrary to—the holding and rationale of those decisions

The Seventh Circuit's narrow focus on high-level personnel wielding the power to take formal employment action is at odds with *Faragher/Ellerth's* formulation of the rule: the Court held an employer would be vicariously liable "for an actionable hostile environment created by a supervisor *with immediate (or successively higher)* authority over the employee."

Faragher, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765 (emphasis added).

And as the EEOC and other courts have highlighted, the restrictive gloss that the Seventh Circuit has placed on *Faragher* cannot be reconciled with the result in *Faragher* itself. There, the Court held the City of Boca Raton vicariously liable for the hostile work environment created by David Silverman, who was "responsible for making [Faragher's] daily assignments, and for supervising [her] work and fitness training," but who had no authority to hire, fire, promote, demote, discipline, or transfer her. *Faragher*, 524 U.S. at 781. Indeed, the Court saw the liability issue as so clear that it directed that judgment be entered for the plaintiff on remand. *Id.* at 809.

But even if the specific facts underlying the Court's "supervisor" designation in *Faragher* could be disregarded, but see *Cohens* v. *Virginia*, 19 U.S. 264, 399 (1821) ("[G]eneral expressions, in every opinion are to be taken in connection with the case in which those expressions are used"), the restriction the Seventh Circuit has read into *Faragher* and *Ellerth* "[does] violence to the *rationale*" of those decisions. *Grozdanich* v. *Leisure Hills Health Center, Inc.*, 25 F. Supp. 2d 953, 973 (D. Minn. 1998) (emphasis added).

In *Faragher* and *Ellerth*, the Court held that (subject to the narrow affirmative defense) employers are liable under Title VII for supervisors' actionable harassment. Grounding its reasoning in the "aided in authority" principle of the Restatement (Second) of Agency § 219 (1957), the Court identified

two principal ways in which supervisory authority aids harassers: (1) supervisory authority enables harassers "to keep subordinates in their presence while they make offensive statements," and (2) harassers can "implicitly threaten to misuse their supervisory powers to deter any resistance or complaint." *Faragher*, 524 U.S. at 801. In these ways, a supervisor's abusive behavior "necessarily draw[s] upon his superior position over the people who report to him, or those under them," such that "an employee generally cannot check a supervisor's abusive conduct the same way that she might deal with abuse from a co-worker." *Id.* at 803.

Both the primary concerns motivating the Court's adoption of the vicarious liability rule—the harasser's enhanced ability to command his victims' presence and to retaliate against victims who resist—are directly implicated when the harasser has the authority to direct his victim's daily work activities, whether or not he also has the authority to make formal employment decisions. Indeed, this is illustrated by the facts of *Faragher*. The Court held Boca Raton vicariously liable for Silverman's discriminatory misconduct because he had been "'granted virtually unchecked authority'" over the plaintiff and other female lifeguards, "'directly controlling and supervising all aspects of Faragher's day-to-day activities.'" 524 U.S. at 808 (quoting *Faragher* v. *City of Boca Raton*, 111 F.3d 1530, 1544 (11th Cir. 1997) (Barkett, J., concurring in part and dissenting in part)) (brackets omitted). Silverman's ability to retaliate against his victims in no way depended on his ability to make ultimate employment decisions, as illustrated by his

proposition to the plaintiff: "Date me or clean toilets for a year." *Faragher*, 524 U.S. at 780.

The Court did not consider this authority insufficient because Silverman lacked the power to make formal personnel decisions. *Faragher*, 524 U.S. at 808 (holding the defendant vicariously liable for Silverman's conduct). As *Faragher* demonstrates, "[a] supervisor's responsibilities do not begin and end with the power to hire, fire, and discipline employees," but rather include "the day-to-day supervision of the work environment." *Meritor*, 477 U.S. at 76 (Marshall, J, concurring). Yet under the Seventh Circuit's restricted reading of *Faragher*, employers are insulated from liability for harassment by immediate supervisors like Silverman, who exert great employer-conferred authority over their victims' day-to-day work lives, but lack the ultimate authority to make the employment decisions required by *Parkins*. But "[i]n both cases it is the authority vested in the supervisor by the employer that enables him to commit the wrong." *Ibid.*

Strict application of the Seventh Circuit rule produces perverse consequences in a world in which large employers with "multiple worksites vest the managers of such sites with substantial authority and discretion to run them but reserve formal employment authority to a few individuals at central headquarters": the rule simply "does not comport with the realities of the workplace." *Rhodes*, 359 F.3d at 510 (Rovner, J., concurring). Not only does it produce "the practical, if unintended effect of insulating employers from liability for harassment perpetrated by" the managers who actually direct

most employees' daily activities, *ibid.*, but the Seventh Circuit rule also inexplicably reserves vicarious liability to those within internal personnel departments who, far from having special power to "keep subordinates in their presence," *Faragher*, 524 U.S. at 801, have almost no contact with the workers whose employment terms they are empowered to alter.

Such context-blind rigidity places the Seventh Circuit rule in plain tension with this Court's pragmatic approach to Title VII. The Court has long recognized that Title VII should be construed with "common sense," *Burlington Northern & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 70 (2006), and an eye toward workplace reality. Thus, there is more to Title VII's coverage than the "terms and conditions" of employment "in the narrow contractual sense," *Faragher*, 524 U.S. at 786, for "the real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." *Oncale*, 523 U.S. at 81-82. In light of these considerations, the Court has repeatedly rejected unrealistic and mechanical bright-line tests for standards phrased "in general terms" where the "[c]ontext matters." *Burlington Northern*, 548 U.S. at 69; see, *e.g.*, *Robinson* v. *Shell Oil Co.*, 519 U.S. 337 (1997) (recognizing that employers may unlawfully retaliate against former as well as current employees); *National R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101 (2002) (recognizing that acts occurring outside the statutory time period may nevertheless contribute to a hostile

work environment that existed within the statutory time period).

Burlington Northern is especially instructive because, in dealing with the problem of retaliation—a central concern motivating the *Faragher* and *Ellerth* rule—the Court rejected rigid rules limiting application of the Title VII anti-retalition provision to "ultimate employment decisions," 547 U.S. at 67, and instead adopted a standard reaching those actions "a reasonable employee" would have found to be "materially adverse." *Id.* at 68. As the Court observed, "[c]ommon sense" indicates that abusing the authority to direct daily work activities—such as by "insist[ing] that [the victim employee] spend more time performing the more arduous duties and less time performing those that are easier or more agreeable"—is "one good way to discourage an employee * * * from bringing discrimination charges." *Id.* at 70-71. That same power can prevent a victim from effectively responding to her supervisor's harassment, just as it can be wielded to retaliate against a victim who has already reported discrimination.

The courts that have adopted the Seventh Circuit rule have failed to produce a convincing rationale for their restriction of *Faragher* and *Ellerth*. Some have raised concern that the Second Circuit and EEOC interpretations of *Faragher* and *Ellerth* are insufficiently determinate. See, *e.g.*, *Browne* v. *Signal Mountain Nursery*, 286 F. Supp. 2d 904, 914 (E.D. Tenn. 2003). But as the Second, Fourth, and Ninth Circuits, the EEOC (and this Court in *Faragher*) have demonstrated, it is certainly possible to determine whether a harasser is a supervisor

without resorting to an enumeration of formal personnel powers. And courts and employers in jurisdictions applying the *Parkins* test regularly determine supervisory status according to a multi-factor analysis for purposes of the National Labor Relations Act. See 29 U.S.C. § 152(11); *N.L.R.B.* v. *Kentucky River Community Care, Inc.*, 532 U.S. 706, 712-713 (2001). Such concerns, moreover, rest on the erroneous premise that designating fewer harassers as supervisors and more harassers as co-workers simplifies "employer responsibility" determinations. In fact, determining supervisory status under a broader test arguably reduces the complexity of determining employer liability under *Faragher* and *Ellerth* by enabling courts and employers to avoid the complex and fact-intensive co-worker negligence inquiry altogether.

Some proponents of the Seventh Circuit rule have speculated that a less restrictive definition of supervisor would erode employers' incentive "to engage in preventive forethought," see, *e.g.*, *Browne*, 286 F. Supp. 2d at 914—as if employers would respond to the prospect of vicarious liability for harassment by front-line managers by giving up on the project of combating workplace harassment altogether. Such an irrational response would not only place them in violation of longstanding EEOC policy—which requires employers to "take all steps necessary to prevent sexual harassment from occurring," 29 C.F.R. § 1604.11—but would also vastly increase their liability exposure, given the central role that implementation of preventive policies plays under both the co-employee and supervisor harassment regimes.

III. THIS CASE PROVIDES A DIRECT OPPORTUNITY TO SETTLE AN ISSUE OF FAR-REACHING IMPORTANCE

The issue presented here—whether a harasser must have power over the formal employment status of the victim to be a "supervisor"—is of large legal and practical significance. At present, whether an employee subjected to severe racial and sexual harassment by her direct supervisor is able to obtain relief under Title VII will often depend on the circuit in which the conduct occurred. For example, the harassers in *Rhodes*, responsible for "assembling crews and assigning tasks to employees," 359 F.3d at 502, could be supervisors in circuits that use the "power to direct" definition. "[W]hatever formal employment authority they lacked, a factfinder reasonably might conclude that the power * * * given [to] them to manage the Yard on a day-to-day basis enabled or facilitated their ability to create a hostile work environment for [the victim]." *Id.* at 510 (Rovner, J., concurring) (citing *Mack*, 326 F.3d at 126). And the harasser in *Mack*, who lacked "'the power to hire, fire, demote, promote, transfer, or discipline,'" 326 F.3d at 126 (quoting *Parkins*, 163 F.3d at 1034), would not be a supervisor in circuits such as the Seventh that demand this power.

These differing rules have important consequences. The plaintiff in *Rhodes* was unable to raise even a triable question under the negligence standard, 359 F.3d at 507, while the lower court decisions in *Mack*—and for that matter, *Faragher*—were reversed with instructions that plaintiffs be granted judgment as a matter of law. *Mack*, 326 F.3d at 127; *Faragher*, 524 U.S. at 810. Indeed, as

this case itself illustrates, establishing employer responsibility based on negligence can be especially difficult as a practical matter: the unrepresented and legally unsophisticated employee was faulted both for complaining too much and not enough, while the employer's administrators, well-versed in employment law litigation, were able to "build a record" of impressive-seeming but hollow "investigations." In contrast, Ball State would have no realistic prospect of prevailing under the limited affirmative defense *Faragher* provides for "supervisor" harassment cases: Ms. Vance reported instances of Davis's harassment numerous times, App., *infra*, 3a-7a, so any argument that she took insufficient steps to avoid harm would be very unlikely to succeed.

These issues are no small matter. During the twelve-month period ending September 30, 2010, 14,543 employment discrimination cases were filed in United States courts—the third-largest category of civil cases, behind prisoner petitions and asbestos claims. Table C-2. U.S. District Courts–Civil Cases by Jurisdiction and Nature of Suit, U.S. Courts, 146 (Sept. 2010), available at http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/appendices/C02Sep10.pdf. And in 2010 alone, the EEOC received more than 30,000 harassment charges. EEOC, Charge Statistics–FY 1997 through FY 2010, available at http://www.eeoc.gov/eeoc/statistics/enforcement/harassment.cfm. Employers agree that this issue is "an important and recurring issue of federal law." Pet. for Cert., *Mack* v. *Otis Elevator Co.*, No. 03-229, at 12. In the modern workforce, where many acts of

discrimination are committed by intermediate-level individuals in a large hierarchical organization such as Ball State University, resolution of this issue will undoubtedly add clarity to a great many employment discrimination disputes.

This case presents an excellent opportunity to settle this important issue. The definition of supervisor used by the Seventh Circuit determined the outcome below. The lower courts considered the employer's liability only under the negligence standard, and not under the vicarious liability standard. App., *infra*, 15a. Because the affirmative defense under *Ellerth* and *Faragher* will be unavailable to Ball State, Ms. Vance may prevail if Davis is determined to be a supervisor.

This issue is now ripe for review. Six courts of appeals have already defined supervisor in this context, and they remain committed to their differing positions, so nothing more would be gained by allowing further percolation of this issue. Resolution by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A
Seventh Circuit Opinion
In the
United States Court of Appeals
For the Seventh Circuit

No. 08–3568

MAETTA VANCE,

Plaintiff–Appellant,

v.

BALL STATE UNIVERSITY, *et al.*,

Defendants–Appellees.

Appeal from the United States District Court
For the Southern District of Indiana, Indianapolis Division.

No. 1:06-cv-1452—**Sarah Evans Barker**, *Judge*.

ARGUED NOVEMBER 29, 2010—DECIDED JUNE 3, 2011

Before BAUER, WOOD, and SYKES, Circuit Judges.

WOOD, *Circuit Judge*. Maetta Vance was the only African–American working in her department at Ball State University ("Ball State") when racially

charged discord erupted. In 2005, Vance began filing complaints with Ball State about her coworkers' offensive conduct, which included the use of racial epithets, references to the Ku Klux Klan, veiled threats of physical harm, and other unpleasantries. In 2006 she filed two complaints with the Equal Employment Opportunity Commission ("EEOC") for race discrimination and, later, retaliation. After getting her right-to-sue letter, she filed this action in federal court alleging a range of federal and state discrimination claims. The district court granted summary judgment for the defendants and dismissed the case. On appeal, Vance pursues only her hostile work environment and retaliation claims against Ball State based on asserted violations of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e *et seq.* Because she has not established a basis for employer liability on the hostile work environment claim or put forth sufficient facts to support her retaliation claim, we affirm.

I

Ball State prevailed on summary judgment, and so we recite the facts in the light most favorable to Vance, the non-moving. Vance began working for Ball State in 1989 as a substitute server in the Banquet and Catering Department of University Dining Services. In 1991, Ball State promoted Vance to a part-time catering assistant position, and in January 2007 Vance applied and was selected for a position as a full-time catering assistant. Between 1991 and 2007, Vance gained expertise as a baker and enjoyed the challenge of baking items from scratch. After she began work as a full-time employee, a position that included a modest raise

and a significant increase in benefits, her assignments changed. Her new work consisted of preparing food, including dinners for formal events, boxed lunches for casual engagements, and sides and salads, for the catering department's clients.

For many years things progressed uneventfully. But in 2001, Saundra Davis, a coworker, hit Vance on the back of the head without provocation. The two were discussing a work-related duty when Davis became aggressive, shouted at Vance, and slapped Vance as she turned away. Vance orally complained to her supervisors, but because Davis soon transferred to another department Vance did not pursue the matter. Also around that time, Bill Kimes became Vance's supervisor. According to Vance, Kimes gave her the cold shoulder, made her feel unwelcome at work, and treated other employees to lunch when she was not around. He refused to shake her hand when they first met in 2001, and he routinely used a gruff tone of voice with her.

Things took a turn for the worse in 2005. Davis returned to Vance's department, and on September 23, 2005, the two had an altercation in the elevator. Davis stood in Vance's way as she tried to get off the elevator and said, "I'll do it again," which Vance took to be a reference to the slap in 2001. A few days later, Vance heard from a fellow employee that another coworker, Connie McVicker, used the racial epithet "nigger" to refer to Vance and African–American students on campus. McVicker also boasted that her family had ties to the Ku Klux Klan. On September 26, 2005, Vance complained orally to her supervisor about McVicker's statements, and on October 17, 2005, she called

University Compliance to request a complaint form. While requesting the document, Vance again complained about McVicker's racially offensive comments and, for the first time, informed Ball State that Davis had slapped her four years earlier. In early November, Vance submitted a written complaint detailing McVicker's comments and the elevator incident with Davis.

Ball State began investigating Vance's complaint regarding McVicker immediately. Once Vance spoke to University Compliance on October 17, 2005, two supervisors, Lisa Courtright and Kimes, met to discuss how to handle the matter. Courtright sent Vance a letter to inform her that they were investigating. In the meantime, several people from Employee Relations became involved. Kimes's investigation corroborated Vance's account of what McVicker said, although the witnesses could not recall whether McVicker used the epithet generally or directed it at Vance. The Assistant Director of Employee Relations sent an email to the Director, stating: "I know we don't have the specifics on exactly what and when these utterances were ... but we need to make a strong statement that we will NOT tolerate this kind of language or resulting actions in the workplace." Ball State used a four-step process to handle employee discipline, starting with a verbal warning for the first infraction, followed by a written warning for the second, with escalating consequences for further violations. Within this context, the Assistant Director concluded, "I think we can justify going beyond our limited prior past history and issue a written warning ... we should also strongly advise her verbally when we issue this that

it must stop NOW and if the words/behavior are repeated, we will move on to more serious discipline up to an[d] including discharge."

Following this recommendation, Kimes gave McVicker a written warning on November 11, 2005, for "conduct inconsistent with proper behavior." The warning explained that McVicker was being disciplined for using offensive racial epithets, discussing her family's relationship with the KKK, and also "looking intently" and "staring for prolonged periods at coworkers." Kimes advised McVicker that additional violations would lead to further disciplinary action. Days later, Courtright met with McVicker to discuss the warning; Courtright reiterated that racially offensive comments would not be tolerated. She also suggested that McVicker should consider avoiding Vance and transferring to another department.

That same day, Vance complained to Courtright that McVicker referred to her as a "porch monkey." Courtright advised Vance to tell Kimes, which Vance did. Kimes investigated by speaking to another coworker whom Vance said witnessed the incident, but that coworker did not corroborate Vance's allegation. In turn, Kimes told Vance that without any witnesses he could not discipline McVicker, who denied making the comment. Kimes said that further action on this issue would devolve into a "she said-she said" exchange. Kimes did not discipline McVicker for the "monkey" comment, nor does the record suggest that Courtright mentioned it when she spoke to McVicker later that week. Kimes did, however, try unsuccessfully to schedule McVicker and Vance to work on alternating days. Over a year

later, McVicker voluntarily transferred to another department.

In response to Vance's complaint about the September 23, 2005, elevator incident with Davis, Ball State investigated but found conflicting accounts of what had happened. Before Vance filed her written complaint on November 7, 2005, Davis had filed a complaint alleging that Vance said to Davis: "Move, bitch ... you are an evil f- - - - - - - bitch." Kimes discussed the situation with his supervisor, and they decided that counseling both employees about respect in the workplace was the best path to follow. Kimes spoke with Vance about how to communicate respectfully in the workplace, but it is unclear whether he had a similar conversation with Davis. No one was disciplined for the incident. Around this time, though the record is not clear about the date, Davis made references to "Sambo" and "Buckwheat" while having a conversation with another coworker in Vance's presence. Vance understood these words to be used in a racially derogatory way and thus felt offended by them, but she did not complain to Ball State at that time.

Conditions were not improving for Vance, and on December 22, 2005, she informed Kimes that she felt threatened and intimidated by her coworkers. The following week Vance filed a charge with the EEOC alleging race, gender, and age discrimination. Vance also complained that, throughout this period, Davis and McVicker gave her a hard time at work by glaring at her, slamming pots and pans around her, and intimidating her. In 2006, Vance filed a complaint identifying a variety of other instances

where she felt harassed, including being "blocked" on the elevator by Davis who "stood there with her cart smiling"; being left alone in the kitchen with Davis, who smiled at her; and being around Davis and McVicker, who gave her "weird" looks. She also filed a complaint alleging that Karen Adkins, a supervisor, "mean-mugged" her. Ball State investigated these incidents but found no basis to take disciplinary action.

On May 10, 2006, Vance filed a complaint with Ball State against her supervisor, (still) Kimes, alleging that he forced her to work through breaks. Ball State investigated but found no factual basis for the allegation. In August 2006, Vance filed a second complaint with the EEOC alleging that Ball State retaliated against her by assigning her diminished work duties, forcing her to work through breaks, denying her the chance to work overtime hours, and unequally disciplining her. She filed this lawsuit on October 3, 2006.

While her case was pending before the district court, Ball State promoted Vance to the position of a full-time catering assistant. Still, the strife did not abate. In April 2007, Vance filed a grievance against McVicker for saying "payback" to her. Three supervisors, including Kimes, investigated; McVicker countered that Vance had said to her: "Just the beginning bitch—you better watch your house." Both women denied the allegations against them, and Ball State did not discipline anyone. In August 2007, Davis said to Vance, "are you scared," in a Southern accent. Ball State investigated and warned Davis verbally not to engage in such behavior. That same month, Vance complained that during a routine day

of work Kimes aggressively approached her while repeatedly yelling the same question at her. When Ball State investigated, the witness identified by Vance did not corroborate her account of the incident. Instead, the witness supported Kimes's version of what had occurred and added that it was common for Kimes to repeat himself until he was sure the other person had heard him. In September 2007, Davis complained that Vance splattered gravy on her and slammed pots and pans around her. Vance denied the allegation but, even though no witnesses corroborated the event, Ball State warned Vance about its policies.

Vance also complains that Ball State retaliated against her for complaining about the racial harassment. Although she was promoted in 2007, Vance argues that Ball State reassigned her to menial tasks such as cutting vegetables, washing fruit, and refilling condiment trays. In her view, Ball State made her into a "glorified salad girl" even though she possessed a range of advanced skills that could have been better utilized baking or cooking complete meals.

II

A

Before reaching the merits of Vance's claim, we must resolve an evidentiary issue. After all dispositive motion deadlines had passed and both parties had submitted their summary judgment briefs, Vance sought to supplement the record with evidence of two incidents that took place in early 2008. The evidence included two affidavits testifying to a verbally abusive encounter with Davis's

daughter and husband. During that incident, Davis's kin insulted Vance and another coworker with racial epithets and physically threatened them on university property. The affidavits document this episode and Kimes's alleged failure to respond when Vance complained. Vance also submitted two articles published in an on-line Ball State forum that discussed Vance's discrimination claims against the university, along with scores of "comments," some racially offensive, posted in response to the articles. One of the articles was written by one of Vance's coworkers.

Vance submitted the evidence on March 12, 2008, and Ball State moved to strike. Ball State argued before the district court that Vance was attempting "an end run" around Federal Rule of Civil Procedure 15(d) by styling her submission as a supplement to the summary judgment record rather than a supplemental pleading. The district court concluded that Vance's supplemental evidence fell within the purview of Rule 15(d), analyzed it as if Vance had filed a Rule 15 motion, and granted Ball State's motion to strike. On appeal, Vance asserts that the court should have permitted her to supplement the record, while Ball State defends the district court's ruling on the ground that the contested evidence presents new factual allegations against persons not party to this lawsuit.

In our view, these materials are best viewed as supplemental to the summary judgment record rather than as a disguised Rule 15(d) submission. When a plaintiff initiates a hostile work environment lawsuit, as opposed to a suit claiming discrimination based on discrete acts, she usually complains of an

employer's continuing violation of Title VII "based on the cumulative effect of individual acts." See *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002) (recognizing that hostile environment claims by their very nature involve repeated conduct). The continuing violation doctrine is usually invoked to defeat a statute of limitations bar for conduct that falls outside the relevant period, see *Dandy v. UPS, Inc.*, 388 F.3d 263, 270 (7th Cir. 2004), but we think the general concept is instructive in this context as well. That is, a Title VII hostile work environment claim is against the employer for the aggregate conduct of one or more of its employees. By adding more "individual acts" as evidence of a hostile work environment claim, a plaintiff does no more than strengthen her evidentiary record; this is not enough to allege a discrete new claim. See *Morgan*, 536 U.S. at 115, 122 S.Ct. 2061 ("Hostile environment claims are different in kind from discrete acts.").

Thus, Ball State misses the mark when it contends that these materials implicate persons not named as defendants in this lawsuit. Title VII regulates the conduct of employers, not individual employees. See 42 U.S.C. § 2000e–2(a). If admitted, Vance's supplemental evidence might have cast some light on her hostile work environment claim against Ball State. Whether Ball State is liable for the conduct of an employee's family member or statements in a university publication is a separate question we need not resolve, because the district court did not abuse its discretion in excluding the evidence. Vance moved to supplement the record after the deadlines for discovery and dispositive

motions had "long passed." We regularly affirm a district court's decision to exclude supplemental evidence in the interest of keeping cases moving forward. See, *e.g.*, *Pfeil v. Rogers*, 757 F.2d 850, 858 (7th Cir. 1985).

B

Turning to the merits, we apply the well-known *de novo* standard of review to Vance's case. See *Chaney v. Plainfield Healthcare Center*, 612 F.3d 908, 912 (7th Cir. 2010). Vance argues that the facts she has alleged and supported are sufficient to get her case before a jury, which would then determine whether her hostile work environment and retaliation claims are meritorious. We examine each of her arguments in turn.

Title VII prohibits employers from discriminating against a person with respect to her "compensation, terms, conditions, or privileges of employment, because of such individual's race." 42 U.S.C. § 2000e–2(a)(1). Ball State, however, is not liable to Vance under Title VII for a hostile work environment unless Vance can prove (1) that her work environment was both objectively and subjectively offensive; (2) that the harassment was based on her race; (3) that the conduct was either severe or pervasive; and (4) that there is a basis for employer liability. See *Dear v. Shinseki*, 578 F.3d 605 (7th Cir. 2009); *Cerros v. Steel Technologies, Inc.*, 288 F.3d 1040, 1045 (7th Cir. 2002) ("*Cerros I*"). We emphasize, as we have before, that the third element of the plaintiff's *prima facie* case is in the disjunctive—the conduct must be *either* severe *or* pervasive. See *Cerros v. Steel Technologies, Inc.*, 398

F.3d 944, 950 (7th Cir. 2005) ("*Cerros II*"). The question whether there is a basis for employer liability depends on whether the alleged harassment was perpetrated by supervisors or coworkers. See *Williams v. Waste Mgmt. of Ill.*, 361 F.3d 1021, 1029 (7th Cir. 2004); see generally *Faragher v. City of Boca Raton*, 524 U.S. 775, 807–08, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998), and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764–65, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998). Employers are "strictly liable" for harassment inflicted by supervisors, but they can assert an affirmative defense when the harassment does not result in a tangible employment action. 361 F.3d at 1029 (citing *Ellerth*, 524 U.S. at 756, 118 S.Ct. 2257 and *Faragher*, 524 U.S. at 807–08, 118 S.Ct. 2275). If only coworkers were culpable for making a work environment hostile, the plaintiff must show that the employer has "been negligent either in discovering or remedying the harassment." *Id.* (internal citations omitted).

Vance argues that three supervisors, Kimes, Adkins, and Davis, harassed her on account of her race. To begin, Vance argues that there are disputed facts regarding whether Davis was her supervisor, making summary judgment inappropriate on this issue. We find no such ambiguity. Under Title VII, "[a] supervisor is someone with power to *directly* affect the terms and conditions of the plaintiff's employment." *Rhodes v. Ill. Dep't of Transp.*, 359 F.3d 498, 506 (7th Cir. 2004). That authority "primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee." *Hall v. Bodine Elec. Co.*, 276 F.3d 345, 355 (7th Cir. 2002) (internal quotation marks and citations omitted). We

have not joined other circuits in holding that the authority to direct an employee's daily activities establishes supervisory status under Title VII. See *Rhodes*, 359 F.3d at 509 (Rovner, J., concurring) (arguing for a broader standard of supervisor liability based on EEOC guidelines). We conclude that Vance has not revealed a factual dispute regarding Davis's status by asserting that Davis had the authority to tell her what to do or that she did not clock-in like other hourly employees. This means that we must evaluate her claim against Davis under the framework for coworker conduct.

We can also summarily dispose of Vance's allegations against supervisor Adkins. Vance's brief says little about what Adkins may have done to make her work environment hostile. Before the district court, Vance argued that Adkins "mean-mugged" her and stared at her when they were in the kitchen together. Making an ugly face at someone and staring, while not the most mature things to do, fall short of the kind of conduct that might support a hostile work environment claim.

Vance's complaints about Kimes require a closer look, but this reveals that she has failed to establish that Kimes's conduct had a racial "character or purpose." See *Luckie v. Ameritech Corp.*, 389 F.3d 708, 713 (7th Cir. 2004). Although there is some indication in the record that Kimes was generally difficult to work with, we assume, favorably to Vance, that he picked on her. Still, even in that light, Vance's allegations do not establish that Kimes's unkind or aggressive conduct was motivated by Vance's race. Although a plaintiff does not need to identify an explicitly racial dimension of the

challenged conduct to sustain a Title VII claim, she must be able to attribute a racial "character or purpose" to it. See *Hardin v. S.C. Johnson & Son, Inc.*, 167 F.3d 340, 345 (7th Cir. 1999). Vance has not put forth any facts to establish that any of Kimes's conduct was motivated by, or had anything to do with, race. To the contrary, in her deposition Vance conceded that she never heard Kimes say anything suggesting ill will towards her because of her race, nor did any other employee report to Vance that Kimes had uttered racially derogatory comments. The undisputed facts establish that there are no grounds for employer liability for violation of Title VII based on the conduct of Vance's supervisors.

This leaves Vance's treatment at the hands of her two coworkers, Davis and McVicker. When evaluating a hostile work environment claim, we consider "the entire context of the workplace," see *Cerros I*, 288 F.3d at 1046, not the discrete acts of individual employees. The district court analyzed Vance's allegations against Davis and McVicker separately, finding that summary judgment was proper based on the conduct of each woman independently. We stress that a hostile work environment claim requires a consideration of all the circumstances, because in the end it is the employer's liability that is at issue, not liability of particular employees. Thus, for example, if we had found that Vance's supervisors had contributed to a racially hostile work environment, that conduct would form part of the context for Vance's claim against Ball State, just as the actions of her coworkers would. The only reason we have divided our analysis between the conduct of supervisors and

employees is to ensure that we are respecting the standards for vicarious liability that apply. See *Williams*, 361 F.3d at 1029.

Assuming without deciding that Vance's allegations against her coworkers satisfy the first three elements of a Title VII hostile work environment claim, we conclude nonetheless that Vance cannot prevail because there is no basis for employer liability. See *Tutman v. WBBM–TV, Inc./CBS, Inc.*, 209 F.3d 1044, 1048–49 (7th Cir. 2000) ("We do not decide whether a hostile work environment existed because the question whether [the employer] took prompt and effective action is dispositive here."). For Ball State to be liable, Vance must put forth sufficient facts to establish that it was negligent in failing to "take reasonable steps to discover and remedy the harassment." *Cerros II*, 398 F.3d at 953. Once aware of workplace harassment, "the employer can avoid liability for its employees' harassment if it takes prompt and appropriate corrective action reasonably likely to prevent the harassment from recurring." *Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965, 978 (7th Cir. 2004) (internal citations omitted). While it is unfortunate that Ball State's remedial measures did not persuade Davis or McVicker to treat Vance with respect, and we have nothing but condemnation for the type of conduct Vance has alleged, we find that Ball State satisfied its obligation under Title VII by promptly investigating each of Vance's complaints and taking disciplinary action when appropriate. See *Porter v. Erie Foods Int'l Inc.*, 576 F.3d 629, 636 (7th Cir. 2009) ("Our focus, therefore, is on whether [the employer] responded promptly and effectively to the

incident.").

Between October 2005 and October 2007, Vance filed numerous complaints about her troublesome encounters with Davis and McVicker. Ball State took reasonable corrective action as Vance lodged each complaint. In response to Vance's complaint that McVicker used the racial epithet "nigger" and bragged about her family connections with the Ku Klux Klan, Ball State promptly investigated, involved the appropriate supervisory personnel, and issued a written reprimand to McVicker. According to Ball State policy, McVicker technically should have received a stage-one oral warning because she had no prior complaints on her record, yet the university concluded that a more serious measure was in order. The written warning conveyed to McVicker that her racially offensive language would not be tolerated, and two supervisors met with McVicker separately to discuss the matter. Meanwhile, a supervisor remained in contact with Vance and assured her that they were investigating her complaint.

Vance lodged two additional complaints against McVicker during this period, one in November 5, 2005, for referring to her as a "porch monkey" and one in April 2007 for saying "payback." In response to the 2005 complaint, Ball State again promptly investigated, but a witness identified by Vance could not corroborate that McVicker used the offensive term to refer to Vance. Similarly, Ball State uncovered competing versions of what took place in connection with Vance's 2007 "payback" complaint. When Ball State questioned McVicker about the incident, she counter-complained that Vance said:

"Just the beginning bitch—you better watch your house."

Again, we are taking the view of these facts that favors Vance; we express no opinion about what "really" happened. From that perspective, we assume that McVicker made the alleged statements. On the issue of employer liability, however, we must look at the employer's response in light of the facts it found in its investigation. See *Porter*, 576 F.3d at 636 (observing that, "taken as a whole," the employer "took appropriate steps to bring the harassment to an end"). It may be commonplace that an employee accused of verbally abusing or intimidating a coworker denies the allegation. But Ball State did what it could and did not stop by accepting a simple denial. Moreover, the record does not reflect a situation in which all ties went to the discriminator; if it did, we would be inclined to send this case to a jury. Ball State, however, calibrated its responses depending on the situation. Sometimes when it was unsure who was at fault it counseled both employees; sometimes it warned alleged wrongdoers to take care or desist.

Vance complained to her supervisors several times about Davis's conduct. The two most serious allegations relate to the elevator incident in 2005 and the "are you scared" comment in 2007. We note that Vance conceded at her deposition that she did not complain to Ball State about Davis's use of the terms "Sambo" and "Buckwheat." We take Vance at her word that, in context, the terms "Sambo" and "Buckwheat" were used as explicit racial slurs that would require remedial measures from an employer under Title VII. See *Daniels v. Essex Group, Inc.*, 937

F.2d 1264, 1266 (7th Cir. 1991) (noting "Buckwheat" is a racial taunt); *Boyd v. State Farm Ins. Co.*, 158 F.3d 326 n.1 (5th Cir. 1998) ("[I]n the context of employment discrimination law, the term 'Buckwheat' is generally considered to be a racial slur or epithet."). Under Title VII, however, an employer's liability for coworker harassment is not triggered unless the employee notifies the employer about an instance of racial harassment.

Ball State first learned of the September 23, 2005, altercation from Davis, when she filed a complaint against Vance for saying, "Move, bitch ... you are an evil f– – – – – – bitch." Later, Vance complained that Davis had said, "I'll do it again," referring to, according to Vance, the time in 2001 when Davis slapped her. Ball State investigated, but both women stuck to their stories and denied saying anything offensive to the other. Ball State's response to this altercation was reasonable. We have said that Title VII is "'not ... a general civility code' and we will not find liability based on the 'sporadic use of abusive language.'" *Ford v. Minteq Shapes and Services, Inc.*, 587 F.3d 845, 848 (7th Cir. 2009) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 788, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998)). Faced with competing complaints, the first of which was lodged against Vance, Ball State pursued a reasonable course of action by counseling *both* employees about civility in the workplace. Finally, after Vance complained that Davis said "are you scared" to her in a Southern accent, Ball State again investigated. Although Davis denied making the statement, Ball State again formally warned Davis orally to refrain from such actions. This response

was reasonable in light of the circumstances.

The catering department was undoubtedly an unpleasant place for Vance between 2005 and 2007. Yet the record reflects that Ball State promptly investigated each complaint that she filed, calibrating its response to the results of the investigation and the severity of the alleged conduct. As we have said before, prompt investigation is the "hallmark of reasonable corrective action." *Cerros II*, 398 F.3d at 954. This is not a case where the employer began to ignore an employee's complaints as time went on. Ball State investigated Vance's complaint against Davis in 2007 with the same vigor as it did her complaint in 2005. Of course, the ideal result of an employee's complaint would be that the harassment ceases. But Title VII does not require an employer's response to "successfully prevent[ ] subsequent harassment," though it should be reasonably calculated to do so. *Cerros II*, 398 F.3d at 954 (quoting *Savino v. C.P. Hall Co.*, 199 F.3d 925, 933 (7th Cir. 1999)). In this case, we conclude that the undisputed facts demonstrate that there is no basis for employer liability.

C

Vance also alleges that Ball State retaliated against her for complaining about the racial harassment by reassigning her to menial tasks, denying her overtime hours, and unequally disciplining her. Employers may not punish employees for complaining about workplace conduct that even arguably violates Title VII. 42 U.S.C. § 2000e–3(a); *Sitar v. Indiana Dep't of Transp.*, 344

F.3d 720, 727 (7th Cir. 2003). To establish a *prima facie* case of retaliation, a plaintiff may use either the direct or indirect method of proof. Vance is proceeding only under the indirect method, which requires her to show that (1) she engaged in a statutorily protected activity; (2) she performed her job according to the employer's expectations; (3) she suffered an adverse employment action; and (4) she was treated less favorably than a similarly situated employee. *Stephens v. Erickson*, 569 F.3d 779, 787 (7th Cir. 2009). Once the plaintiff establishes her *prima facie* case, the burden shifts to the defendant to establish a non-invidious reason for the action. The burden then shifts back to the plaintiff to show that the defendant's reason was pretextual. *Id.* Ball State concedes that Vance engaged in a protected activity and does not claim Vance's work performance was sub-par. Our focus is thus on the final two elements of Vance's *prima facie* case.

It is possible for a plaintiff to establish a claim of retaliation based on a change of work responsibilities, "depend[ing] on how much of a change, and how disadvantageous a change, took place." *Sitar*, 344 F.3d at 727; see also *Herrnreiter v. Chi. Hous. Auth.*, 315 F.3d 742, 744–45 (7th Cir. 2002) (listing cases). In order to succeed, " 'a plaintiff must show that a reasonable employee would have found the challenged action materially adverse.' " *Lapka v. Chertoff*, 517 F.3d 974, 985 (7th Cir. 2008) (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006)). Generally, if the challenged action would discourage other employees from complaining about employer conduct that violates Title VII, it

constitutes an adverse employment action. See *Burlington*, 548 U.S. at 57, 68, 126 S.Ct. 2405.

Vance's strongest argument depicts an unusual instance of retaliation, in which Ball State simultaneously promoted her and assigned her to diminished work duties in 2007. The district court observed that whether Vance suffered a materially adverse employment action was a close call, but it concluded that a jury could conclude that her reassignment was materially adverse. Still, the district court concluded that Vance's theory fails because she did not establish that she was treated less favorably than a similarly situated employee. We agree with the district court, and conclude in addition that Vance cannot show that she suffered a materially adverse employment action.

Vance concedes that her promotion included a modest pay raise and a significant increase in benefits. She argues, however, that once promoted she was assigned to more menial tasks. In particular, she asserts that Ball State assigned her to cut vegetables and refill condiments, while entrusting her coworker, Brad Hutson, with more complicated tasks such as preparing complete meals. We recognize that it is possible for an employer to retaliate clandestinely against an employee while formally promoting her, but the record cannot be stretched to support such a theory here. Vance personally sought out the new full-time position; it was her choice to leave the part-time position where she baked often and was generally content with her work assignments. Her new job included some of the tasks about which she is complaining, but it also included a range of other tasks including preparing

more complicated dishes. While Vance may have been disappointed with her new assignments, considering the entire context of her promotion we conclude that no rational jury could find that she experienced a materially adverse employment action.

Put another way, we find that a reasonable person would not be dissuaded from complaining about race discrimination by witnessing the treatment Vance received: a promotion to a full-time position with accompanying benefits, a raise in pay, and—taking all of Vance's allegations as true—a change in work assignments that included basic salad preparation. This case does not present the problem we encountered in *Washington v. Illinois Dep't of Revenue*, 420 F.3d 658 (7th Cir. 2005), where we reversed a grant of summary judgment based on the notion that a change in work schedule that did not affect salary or duties could not constitute an adverse employment action. In *Washington*, we observed that while a reassignment that does not affect pay or opportunities for promotion will "by and large" not be actionable for a retaliation claim under Title VII, " 'by and large' differs from 'never.' " *Id.* at 662. When, as in that case, the employer exploits a known vulnerability of an employee—the plaintiff there relied on her previously established flex-time schedule so she could care for her son, who had Down syndrome—an altered work schedule can constitute an adverse work action. *Id.* Even though a change in assignments, like an altered work schedule, conceivably might amount to an adverse employment action, Vance must allege more than a dislike for her new assignments or a preference for her old ones for her case to go forward.

Approaching the issue as the district court did, by asking whether there was a similarly situated employee, leads to the same result. Only two employees held the position of a full-time catering assistant at the time of this dispute, Vance and Hutson. Both employees were promoted to that position on the same day, and for the most part both were assigned to the same range of duties. We accept Vance's allegation that their work assignments were not identical, but the record reflects that they were assigned to a substantially similar set of tasks. Thus, even if Vance had established that Ball State subjected her to a materially adverse action, her claim would fail because she has not satisfied the final element of the *prima facie* analysis.

Vance also alleges that Ball State retaliated by offering her fewer opportunities to work overtime hours. We said in *Lewis v. City of Chicago*, 496 F.3d 645, 654 (7th Cir. 2007), that the loss of opportunity to work overtime can amount to an adverse employment action. The parties agree that Vance worked fewer overtime hours than Brad Hutson in 2007. Ball State defends by arguing that Hutson is not similarly situated to Vance because he worked significantly more regular hours than her, which, as a consequence, made him available to work more overtime hours. This is in part because Ball State has a "work continuation" policy, which mandates that the employee who began a task that is unfinished at the end of a shift must stay and get the task completed.

The record indicates that Vance often took FMLA leave, called in sick unexpectedly, and left work early for health reasons. Vance does not dispute that she

worked fewer regular hours than Hutson. Instead, she argues that, because she was the more senior employee, she should have been offered more opportunities to work overtime. She adds, without citation or support, that the work continuation policy Ball State relies on is "void." Neither of these arguments is availing. Even if Vance had seniority over Hutson, the undisputed facts establish that they did not work a comparable number of regular hours. Thus, the two are not similarly situated for the purpose of this analysis. Vance's assertion that the work continuation policy is void, without citing evidence in the record, is unhelpful. We have repeatedly said that a "nonmoving party cannot defeat a motion for summary judgment with bare allegations." *de la Rama v. Illinois Dep't of Human Services*, 541 F.3d 681, 685 (7th Cir. 2008).

Finally, Vance argues that Ball State retaliated against her by issuing her a verbal warning for allegedly splattering gravy on Davis and slamming pots and pans on the counter. Although we give the concept of an adverse employment action a generous construction, it is not this broad. Vance appears to concede as much, altering her argument slightly on appeal to claim that Ball State's warning to Vance amounts to taking the side of those who harassed her, which she sees as retaliation through the creation of a more hostile work environment. No reasonable jury could find that the delivery of a verbal warning, based on a complaint from a coworker, constitutes an adverse employment action or creates an objectively hostile work environment.

The judgment of the district court is AFFIRMED.

APPENDIX B

District Court Opinion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MAETTA VANCE,	)	
	)	
Plaintiff	)	
	)	1:06-cv-1452-SEB-JMS
vs.	)	
	)	
BALL STATE UNIVERSITY, WILLIAM KIMES, in his individual and official capacity as General Manager of Ball State University's Banquet and Catering Department, SAUNDRA DAVIS, in her individual and official capacity as a supervising employee of Ball State University's Banquet and Catering Department, KAREN ADKINS, in her individual and official capacity as the Assistant Director of Administration/Personnel/ Marketing for Residence Hall	)	

Dining Service at Ball State)
University, and CONNIE)
MCVICKER,)
)
Defendants.)

ENTRY ON PENDING MOTIONS

This cause is before the Court on cross-motions for summary judgment. Defendants Ball State University ("Ball State"), Bill Kimes, Saundra Davis, Karen Adkins, and Connie McVicker, filed a Motion for Summary Judgment [Docket No. 54] on November 1, 2007. Subsequently, on November 30, 2007, Plaintiff, Maetta Vance, filed a Motion for Partial Summary Judgment [Docket No. 74] on her hostile environment claim. Ms. Vance also filed a Request for Oral Argument on Cross Motions for Summary Judgment [Docket No. 77] on that date.[1] After the cross-motions were fully briefed, on March 12, 2008, Ms. Vance filed supplemental affidavits and evidence in support of her motion for summary judgment and opposing Defendants' motion for summary judgment. On March 17, 2008, Defendants filed a Motion to Strike [Docket No. 125] Ms. Vance's additional submissions.

For the reasons detailed in this entry, we **GRANT** Defendants' Motion to Strike, **GRANT** Defendants' Motion for Summary Judgment in its

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[1] Plaintiff's Request for Oral Argument is hereby **DENIED**. The briefings in this cause are both thorough and prolix. Therefore, we are able to reach our decision based upon these pleadings, and oral argument on the issues before us is unnecessary.

entirety and **DENY** Plaintiff's Partial Motion for Summary Judgment.

Factual Background

In August 1989, Plaintiff, Ms. Vance, an African American female, began working for Ball State as a substitute server in the University Banquet and Catering ("UBC") division of University Dining Services ("Dining Services"). Compl. ¶¶ 12-13; Rubrecht Aff. ¶ 3. Dining Services employs approximately 850 individuals across seven residence hall dining units and other restaurants on campus in such positions as food preparation, wait staff, catering assistant in January 2007, which is the position she currently holds.[2] Vance Dep. at 21. Jon Lewis acts as the Director of Dining Services and heads the entire operation. Rubrecht Aff. ¶ 2. He is assisted by the Assistant Director of Personnel, Training, and Administration, Karen Adkins, who directly reports to Mr. Lewis. *Id.* Both Mr. Lewis and Ms. Adkins supervise Bill Kimes, who serves as the General Manager of UBC (one division of Dining Services) and also oversees the operation of Cardinal Crossing, a food court that serves both students and employees. Kimes Dep. at 8-9. Overall, Mr. Kimes supervises nearly 140 employees – eighty from Cardinal Crossing, and sixty from UBC, including Ms. Vance. *Id.* at 26; Rubrecht Aff. ¶¶ 4-5. Mr. Kimes has supervised Ms. Vance since 1999, when he first began working for Ball State. Kimes Dep. at 26.

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[2] The parties dispute whether this selection constitutes a promotion or a demotion. We address this issue more fully below.

The instant suit arose as a result of Ms. Vance's allegations that, from 1999 through April 2006, she has been subjected to discrimination and harassment on the basis of her race (African-American) by various individuals in the workplace. Compl. ¶ 14. She further contends that Ball State has done nothing to rectify the harassing environment, and instead, has retaliated against her for reporting the behavior. *Id.* ¶ 51.

Plaintiff's Complaints to Defendants Regarding Alleged Racial Discrimination

Ball State bargaining unit employees, such as Ms. Vance, have a number of avenues available to them to log complaints. All complaints of discrimination or harassment that are made by Ball State employees are forwarded to Ball State's Office of Compliance, which coordinates the investigation and resolution procedure. Courtright Aff. ¶ 2. The Office of Compliance maintains a record of all communications to and from the office; phone calls are initially documented at the time the phone conversation occurs and are also logged through an automated electronic filing system and all written documentation is similarly logged upon receipt or dispatch. *Id.* ¶ 3. The Director of the Office of Compliance is Sali Falling, an attorney, who oversees, among other employees, Gloria Courtright, the Assistant Director of the Office of Compliance. *Id.* ¶ 1. Ms. Courtright was the primary individual from the office involved with the investigation and supposed resolution of Ms. Vance's claims of discrimination, harassment, and retaliation, in coordination with Dining Services, UBC, and Employee Relations. *Id.* ¶ 4.

Although all complaints get forwarded to the Office of Compliance, Employee Relations provides an additional avenue for bargaining unit employees, such as Ms. Vance, to bring initial complaints. Rubrecht Aff. ¶ 6. Melissa Rubrecht, who was the Assistant Director of Employee Relations for fifteen years and has acted as the Director since July 1, 2006, coordinated Employee Relations' efforts to address Ms. Vance's complaints with the efforts of the Office of Compliance. *Id.* ¶ 1, ¶ 6.

On November 7, 2005,[3] Ms. Vance filed her first complaint with Ball State, alleging that on September 23, 2005, fellow employee Saundra Davis[4] threatened her and that Connie McVicker, another co-worker, called her racially derogatory names. BSU 0050-0051.

Service Elevator Incident

In the November 7, 2005, complaint, Ms. Vance claimed that Ms. Davis stopped her as she was getting on the UBC service elevator and asked her, "When is this going to stop?" Vance Dep. at 48-49. Ms. Vance reported that although she did not know what Ms. Davis actually meant by that comment, she took it as a threat. *Id.* at 49. Ms. Vance also

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[3] Ms. Vance dated her handwritten complaint October 20, 2005, but the Office of Compliance did not receive it until the day on which it is date stamped, November 7, 2005. BSU 0050-0051.

[4] The parties dispute whether Ms. Davis is a co-worker or a supervisor. We address this issue further below.

contends that Ms. Davis told her, "I'll do it again."[5] BSU 0045. Ms. Vance's complaint was not Ball State's first notice of this incident, however, because approximately six weeks earlier, on the very day of the alleged incident, Ms. Davis was the one who logged her own grievance with BSU regarding the elevator exchange with Ms. Vance. *See* BSU 0044. In her complaint, Ms. Davis alleged that it was Ms. Vance who had acted in a threatening manner in the service elevator and had stated to Ms. Davis, "Move, bitch. You are an evil fucking bitch." BSU 0045.

On the day Mr. Kimes received Ms. Davis's complaint, in September 2005, he interviewed Ms. Davis and Ms. Vance, as well as Betty Skinner, another co-worker whom Ms. Vance identified as a witness. After completing the interviews, Mr. Kimes concluded that his findings were inconclusive, as Ms. Davis and Ms. Vance had conflicting accounts and Ms. Skinner could not corroborate either employee's version of the events because she had not been present during the exchange. *See* BSU 0046. Thus, on September 28, 2005, Mr. Kimes contacted the

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[5] According to Ms. Vance, this statement is in reference to a prior altercation she had with Ms. Davis in either 1999 or 2001, in which Ms. Vance alleges that Ms. Davis slapped her. However, Ms. Vance does not necessarily attribute the slap to racial motivation, as she testified that, "I don't know what provoked her to hit me." Vance Dep. at 96. Ms. Vance further contends that she reported the incident to her supervisors, Mr. Kimes and Ms. Adkins, when it happened, but that they took no disciplinary action. Mr. Kimes and Ms. Adkins deny seeing or hearing about it.

then-Director of Dining Services, Ann Talley, by e-mail, detailing the results of his investigation and requesting guidance as to how to resolve the situation. BSU 000114. After consulting other members of management, Ms. Talley advised Mr. Kimes via e-mail that:

> I believe we can only *counsel* both employees as to showing proper respect for one another, never using unacceptable language, and taking problems to management for solution. I do not believe we can apply policies subject to discipline because there were no witnesses and Vance denied saying words attributed to her by Davis. There seems to be insufficient evidence of wrongdoing on the part of both women.

BSU 000113. Consequently, in October 2005, Mr. Kimes spoke with Ms. Vance and told her that the use of inappropriate language was not to be directed against another person, but did not institute any discipline against her. BSU 0058. It is unclear whether Mr. Kimes had a similar conversation with Ms. Davis following the incident, but we assume so since that would have been consistent with Ms. Talley's directive.

Racial Epithets

Ms. Vance's November 7, 2005, complaint, also contained allegations that her coworker, Ms. McVicker, had made racially derogatory comments about her. Ms. Vance's written complaint was not the first time Ms. Vance had reported Ms. McVicker's behavior. Two months prior, on September 26, 2005, Ms. Vance reported to her then-super-visor, Dave

Ring, that she had heard that she had been called a "nigger" by her coworker, Ms. McVicker. BSU 0060. On that same day, Mr. Ring told Mr. Kimes about Ms. Vance's allegations and Mr. Kimes immediately began an investigation. Ms. Vance identified co-workers Jim Hiday, Amy Geesaman, Maria Julius, Brad Hutson, and Julia Murphy as potential witnesses, all of whom were subse-quently interviewed by Mr. Kimes. Although neither Ms. Vance nor any of the witnesses accused Ms. McVicker of using a racial epithet directly toward Ms. Vance, or otherwise in her presence, various witnesses stated that Ms. McVicker had previously used the word "nigger" in reference to African-American co-workers and Ball State students in the presence of other employees at Ball State and had on prior occasions told co-workers that she had "Klan" members in her family. *See* BSU 0060-0064.

Up to this point, Mr. Kimes's investigation had been based solely upon Ms. Vance's verbal complaint. However, on October 17, 2005, Ms. Vance requested a complaint form from Katie Skinner, an employee of University Compliance, which Ms. Vance later submitted on November 7, 2005, as described above. *See* BSU 0047. In her report following the conversation, Ms. Skinner noted that, when requesting the form to make a written complaint, Ms. Vance stated that an employee had hit her a number of years before, but that she had never before reported it. She also told Ms. Skinner that a co-worker "keeps saying she doesn't like 'niggers' and that she has relatives in the clan." *Id.* Further, Ms. Vance stated that she "feels intimidated and feels that it is racial and she's afraid to be at work." *Id.*

On October 20, 2005, two days after Ms. Vance's request for a written complaint form, Ms. Courtright and Mr. Kimes met again with Ms. Vance to discuss the verbal complaint she had made to Ms. Skinner. Following that meeting, Ms. Courtright sent a letter to Ms. Vance assuring her that Mr. Kimes was currently investigating her complaints and would continue to do so. BSU 0049. After receiving Ms. Vance's written complaint on November 7, 2005, Ms. Courtright sent another letter to Ms. Vance, acknowledging receipt of the complaint and advising that, if Ms. Vance had any new information to bring forward as the investigation continued, she should feel free to do so. BSU 0057.

On November 11, 2005, then-Assistant Director of Employee Relations, Ms. Rubrecht, sent an e-mail to Gary Kramer, the Director of Employee Relations, and to Ann Talley, Director of Residence Dining Services, recommending that Ms. McVicker receive a written warning[6] as discipline for her conduct. In the e-mail correspondence, Ms. Rubrecht stated that:

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[6] According to Ball State's Employee Handbook, employees are generally subject to a four-step, progressive disciplinary policy that ranges from a verbal warning to discharge. Ball State University Employee Handbook § 5.11. Although a written warning, such as Ms. Rubrecht recommended, is generally a second-step disciplinary action, the Handbook provides that supervisors have discretion to determine which step to apply, based on the seriousness of the infraction or other extenuating circumstances. Additionally, the Handbook explicitly provides that "threatening anyone, fighting, or the theft of employee, student, or university property are particularly

> I know we don't have specifics on exactly what and when these utterances were, just general complaints and time frames, but we need to make a strong statement that we will NOT tolerate this kind of language or resulting actions in the work place. Therefore, I think we can justify going beyond our limited prior past history and issue a written warning . . . . I think we should also strongly advise her verbally when we issue this that it must stop NOW and if the words/behavior are repeated, we will move on to more serious discipline up to an[d] including discharge.
>
> BSU 00148.

In accordance with Ms. Rubrecht's recommendation, on November 11, 2005, Mr. Kimes issued Ms. McVicker a written warning for "conduct which is inconsistent with proper behavior." BSU 0066. The written warning provided that Ms. McVicker was being disciplined because "[s]everal witnesses attested to [her] use of the word 'N*****' in verbal reference to African-American students and co-worker[s]; [her] verbal reference to family association with the Ku Klux Klan; and glaring, looking intently, or staring for prolonged periods at co-workers, all which are unacceptable behaviors." *Id.* In the warning, Ms. McVicker was instructed to "[i]mmediately cease unacceptable behaviors" and was put on notice that "[f]uture violations of

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serious offenses and may result in the immediate discharge of the offending party." *Id.*

University rules or regulations will result in further disciplinary action." *Id.*

On that same day (November 11, 2005), Ms. Vance told Ms. Courtright that Ms. McVicker had also referred to her (Ms. Vance) as a "monkey." BSU 00132. Ms. Courtright advised Ms. Vance to tell Mr. Kimes, which Ms. Vance did. However, Mr. Kimes was unable to corroborate Ms. Vance's account of the incident because Betty Skinner, a co-worker whom Ms. Vance said had overheard the racial slur, denied knowledge of any exchange. As a result, Mr. Kimes informed Ms. Vance that, without any witnesses, "proceeding further would diminish this to a she said-she said exchange that wouldn't result in anything positive, but that he would continue if [Ms. Vance] wanted him to." BSU 00133. Ms. McVicker was not given additional discipline based on this alleged incident. Resp. to Request for Admission No. 10.

On November 15, 2005, Ms. Courtright met with Ms. McVicker to discuss the written warning she had received from Mr. Kimes. In that meeting, although Ms. McVicker again denied the allegations, Ms. Courtright informed her that, "while she might not intend anything by her comments, they are perceived by co-workers in a very negative way and they are very inappropriate in the workplace." BSU 00136. In that meeting, Ms. Courtright also suggested that Ms. McVicker consider other available positions at BSU and in order to remove herself from the "charged" environment at UBC. *Id.* Finally, Ms. Courtright advised Ms. McVicker "not to talk to or make comments about [Ms. Vance] and to stay as far away as possible." BSU 00137. In an effort to maintain

distance between Ms. Vance and Ms. McVicker, Mr. Kimes testified that, in 2005, he attempted to schedule alternating weekends for Ms. Vance and Ms. McVicker to work, although he concedes that, "[s]ometimes it didn't work out, but we tried." Kimes Dep. at 50-51.

Ms. McVicker eventually bid on a different job in 2007, and was transferred from UBC to Cardinal Crossing, effective April 22, 2007, approximately a year and five months after the conversation between herself and Ms. Courtright. Exh. W (Transfer Agreement). Even though Ms. McVicker has switched departments, Ms. Vance contends that she still would encounter Ms. McVicker on a regular basis while fulfilling her duties collecting food product. Vance Aff. ¶ 9. Donn Knox, one of Ms. Vance's co-workers, concurred with Ms. Vance, testifying that Ms. Vance encounters Ms. McVicker "almost on a daily basis as much, probably more, as if she would if [Ms. McVicker] was driving the truck." Knox Dep. at 31.

Subsequent Complaints

On December 28, 2005, Ms. Vance filed a claim for race discrimination[7] with the EEOC. Since that date, Ms. Vance has reported to her supervisors subsequent com-plaints of harassment, intimidation, and threats involving, among other individuals, Ms. McVicker, Mr. Kimes, and Ms. Davis.

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[7] Ms. Vance's EEOC charge also included allegations of gender and age discrimination. However, these claims have not been pursued in this litigation.

On April 23, 2007,[8] Ms. Vance filed a grievance against Ms. McVicker, alleging that, on April 21, 2007, as Ms. Vance was getting on the elevator in the basement, Ms. McVicker was exiting the elevator and, as the doors were closing, Ms. McVicker remarked, "Payback." Exh. II (April 23, 2007, IDF Form). BSU officials, including Mr. Kimes, Ms. Adkins and Mr. Lewis, investigated this incident by interviewing both Ms. Vance and Ms. McVicker. Ms. McVicker denied that the alleged exchange on the elevator took place. Further, when Ms. Adkins, Ms. Lewis, and an union representative, Lee Richardson, met with Ms. McVicker on April 26, 2007, Ms. McVicker reported that, on April 23, 2007, (the day that Ms. Vance reported the "payback" incident), Ms. Vance came down the stairs in Cardinal Crossing[9] and stated, "Just beginning bitch – you better watch your house." Exh. OO (April 26, 2007, IDF Form).

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[8] Ms. Vance also filed a complaint on May 10, 2006, in which she alleged a variety of other instances in which she felt she had been harassed. Some of those include being "blocked" on the elevator by Ms. Davis, who allegedly "stood there with her cart smiling"; being left alone in the kitchen with Ms. Davis, who was smiling; being around Ms. McVicker and Ms. Davis "with 3 gals of milk looking at me weird"; and being intimidated by Ms. Adkins who was "mean mugging and following [Ms. Vance] into the dishroom starring [sic]." BSU 0013-15. BSU's Office of Compliance investigated these incidents but ultimately took no disciplinary action.

[9] As mentioned above, Ms. McVicker was transferred to Cardinal Crossing (a separate department from UBC, where Ms. Vance works) effective April 22, 2007.

When asked whether she had made such a comment, Ms. Vance denied the allegation. There were no witnesses to either alleged event and it does not appear that either employee was disciplined in connection with it.

On August 13, 2007, Ms. Vance called Ms. Rubrecht in Employee Relations to report that, on August 10, 2007, she was on the elevator when the doors opened on the third floor and Ms. Davis and another co-worker, Sondra Spears, were standing there. According to Ms. Vance, Ms. Davis asked her, "Are you scared?" BSU 001993. Ms. Rubrecht told her to file a complaint, which Ms. Vance did on August 14, 2007. She listed Patsy Amos, who had been on the elevator with her at the time, as a witness. Ms. Amos confirmed that she recalled hearing Ms. Davis ask the question and that it was "like she had a southern accent." Exh. PP. However, Ms. Amos could not confirm whether the question was intended to be intimidating or even whether it was directed at Ms. Vance because the elevator door was only partially open when she heard Ms. Davis's voice, so she was uncertain whether Ms. Davis "was alone or speaking to someone else." *Id.* Although Ms. Davis denied the allegation, because Ms. Amos was able to substantiate that Ms. Davis had made the comment, Mr. Lewis issued Ms. Davis a verbal warning on September 24, 2007, directing her to "maintain appropriate workplace conversations and conduct [herself] appropriately so as not to disrupt the workplace/aggravate co-workers." BSU 002043.

Also on August 14, 2007, Ms. Vance filed a complaint against Mr. Kimes, alleging that, on August 7, 2007, he came into the kitchen and asked

her if she could ship an order at an earlier time. She responded that she could, but according to Ms. Vance's written grievance, "he continued walking toward me saying that's not what I asked you . . . his eyes were big [and] he kept asking me the same question over and over saying I'll take that as a yes . . . saying I don't understand what you said . . . getting louder and scary looking." BSU 001997. When asked about the incident, Mr. Kimes stated that he stood across the room from Ms. Vance and asked her about the shipment. He alleges that she did not respond even though she heard him, and so he asked her again. When she did not reply a second time, he said that he would take her silence as a yes. BSU 001951. Mr. Kimes denied moving toward Ms. Vance or speaking in a loud and aggressive tone.

Brad Hutson, a co-worker whom Ms. Vance indicated had witnessed the incident, largely confirmed Mr. Kimes's account. He said that, although Ms. Vance nodded in response to Mr. Kimes's inquiry about the shipment, "it is common for Kimes to repeat a request to make certain an order change is properly acknowledged." BSU 001952. Mr. Hutson also stated that Mr. Kimes stood in the same place throughout the exchange, that he did not appear to be aggressive, and that he was not speaking in a loud voice. Based on this investigation, coupled with the facts that there was no evidence of racial overtones, nor was Ms. Vance negatively impacted in terms of pay or job assignment, the Office of University Compliance determined that "no reasonable basis exists to support the allegation made by Vance that Kimes subjected her to unlawful discrimination." *Id.*

Plaintiff's Allegations of Retaliation

On August 10, 2006, Ms. Vance filed a second EEOC charge, this time alleging retaliation. Subsequent to filing this charge, Ms. Vance has alleged instances of retaliatory behavior, including suffering diminished duties, being required to work through breaks and lunches without compensation, failing to be offered overtime hours, and being subject to unfair discipline.

Scheduling and Compensation

On May 10, 2006, Ms. Vance filed a complaint against Mr. Kimes, alleging various instances of retaliation. According to her complaint, on a number of occasions, she was required to work through her break and lunch periods, but in some instances, failed to get compensated for that extra time.[10] BSU 00163-65; Vance Dep. 85-86. Ms. Vance, testified that, although she did not make any official complaints at the time, she notified Mr. Kimes about the discrepancies and then, assuming he would take care of it, she "let it go." Vance Dep. at 92. According to BSU, its investigation revealed that Ms. Vance had not been required to work through significantly more breaks that any other employee in UBC and that Ms. Vance received corrected compensation, just

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[10] When an employee skips a break or works through lunch, he or she is asked to notify a supervisor in order to be paid for the extra time worked that day. Kimes Dep. at 41-42. Ms. Vance contends that she followed the established procedure, by notifying UBC's chef and Mr. Kimes.

as many other employees have received, when a payroll mistake had been made. BSU 00165.

In that same complaint, Ms. Vance also claimed that Mr. Kimes did not give her the opportunity for overtime hours such as he gave other employees. Mr. Kimes responded that Ms. Vance has refused overtime hours that he had offered her in the past and, as a part-time employee (which she was at the time), she was not guaranteed a set number of hours per week. BSU 00164. BSU's Office of University Compliance determined that Ms. Vance had made prior complaints about overtime hours that predated the filing of her EEOC charge and had "expressed the she has a limited number of hours per week that she prefers to work, and many times the overtime opportunities that exist fall outside her preferred work hours." BSU 0016.

Diminished Kitchen Duties

The kitchen staff at Ball State is divided into three levels – substitute (first level), part-time (second level) and full-time (third level). Kimes Dep. at 22. As mentioned previously, when she first began working at Ball State, Ms. Vance was hired as a substitute and was subsequently promoted to part-time, and most recently, was selected for a full-time position by Ms. Adkins. According to Mr. Kimes, although the duties as a kitchen staff employee vary (e.g., baking, prep work, event preparation), the nature of an individual's duties is not necessarily based on the employee's level. Kimes Dep. at 23.

Currently, UBC's chef, Shannon Fultz, is responsible for assigning the kitchen staff daily tasks. *Id.* She gives the kitchen staff employees prep

lists each day, which list their duties for the day, but Mr. Kimes retains the authority to switch employees' duties if the need arises. *Id.* at 23-24. Additionally, when UBC was without a chef in April 2006 and again between September 2006 and December 2006, Mr. Kimes was solely responsible for creating the daily prep lists. *Id.* at 35. Mr. Kimes is also responsible for the kitchen staff scheduling. *Id.* at 38-39. Employees may request a particular day off during the week, but all employees, even those that work full-time, do not always work the same schedule from week to week. *Id.* at 39.

According to Ms. Vance, before she bid on and received the full-time catering position, she had performed most of the baking duties at UBC for approximately seven years. *See* Vance Dep. at 31-35. However, Ms. Vance contends that, since she received the full-time position in January 2007 (and after she filed her EEOC charges), she has not been asked to perform baking duties, despite the fact that she has more experience with baking than any other UBC employee and she routinely received compliments from her clients and co-workers when she had been allowed to bake. Vance Aff. ¶¶ 29-30. Ms. Vance contends that, once she received the full-time position, Mr. Kimes told her that, from then on, she would "never come in at 5:00 in the morning, and [would] not do[] any baking . . . and now [her] job is over in the salad area." Vance Dep. at 33. Ms. Vance further testified that, in line with what Mr. Kimes told her, instead of being "in the bakery area, doing two and three pages of work," her duties now consist of "just putting salads in a bowl and putting dressings in a container." *Id.* Her co-worker, Mr.

Knox, concurs that, after she moved to a full-time position, Ms. Vance was no longer involved in the preparation for "big dinners" but instead was assigned entry level duties, such as "cutting up celery sticks." Knox Dep. at 34-35.

Unequal Discipline

On September 28, 2007, Ms. Vance was issued a verbal warning for inappropriate behavior that she allegedly engaged in on September 4, 2007, (slamming a pan down behind other employees) and on September 14, 2007 (splattering chicken noodles and gravy on Ms. Davis). Exh. 41. Ms. Vance claims that she was issued this warning even though she was not asked about the alleged gravy splatter-ing incident until four days after it happened, and she denied splattering gravy on Ms. Davis, and no witnesses saw her do so. Vance Aff. ¶ 33, ¶¶ 35-36. In contrast, Ms. Vance contends that, when she reported incidents of harassment under similar circumstances (e.g., no witnesses, allegations denied, etc.) against employees who had not filed EEOC charges, her supervisors failed to implement discipline against them.

Plaintiff's Allegations Subsequent to the Briefing of the Cross Motions

On March 12, 2008, following the filings by both parties in their briefings on the cross-motions, Ms. Vance filed supplemental affidavits and additional evidence in support of her motion for partial summary judgment and in opposition to BSU's

motion for summary judgment.[11] In her supplemental affidavit, Ms. Vance testified that, on March 1, 2008, she was on a break with fellow employee, Mr. Knox, when she encountered Ms. Davis and Ms. Davis's daughter, Amanda, outside BSU's student center. According to Ms. Vance, Amanda asked her, "What the fuck are you looking at?" Vance Second Supp. Aff. ¶ 5. Ms. Vance contends that when she did not respond, Amanda stated, "You are a nigger, a fucking nigger. You are trying to get my mother fired. What are you gonna do about it? I'll kick your ass." *Id.* ¶ 7. At that point, Ms. Vance testified that Richard, Ms. Davis's husband, who had been waiting in the car, got out of the car and told Mr. Knox that he was a "backstabbing nigger lover." *Id.* ¶ 9. Ms. Vance claims that Ms. Davis stood by throughout these exchanges and laughed. Although Mr. Knox testified in his affidavit that he did not hear everything that Amanda said to Ms. Vance, he corroborated Ms. Vance's account insofar as he testified that Amanda called Ms. Vance a "fucking nigger" and that Mr. Davis had behaved as Ms. Vance had described.

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[11] On March 17, 2008, Defendants filed a Motion to Strike Plaintiff's March 12, 2008, submissions [Docket No. 125], denying all the allegations contained therein and contending that the submissions "are allegations about recent events which involve unnamed defendants who are not parties to this lawsuit; these new allegations thus concern events which do not appear in Vance's complaint and which have not been subject to response, discovery, or motion." Def.'s Br. at 2. For the reasons detailed more fully below, we **GRANT** Defendants' Motion to Strike.

Knox Aff. ¶¶ 7, 9-10. According to their affidavits, both Ms. Vance and Mr. Knox reported the incident to Mr. Kimes and to the Ball State Police Department. Ms. Vance claims that, rather than addressing the incident, Mr. Kimes told her to "get out of [his] face." Vance Second Supp. Aff. ¶ 12.5.

Ms. Vance's March 12, 2008, submissions also contain two articles and accompanying reader comments that appeared in the Ball State Daily News Online, the online version of Ball State University's student news-paper. The first article, "BSU employee offers view on Dining racism," originally appeared on February 18, 2008, in the "Forum" section of the newspaper. It is written by one of Ms. Vance's co-workers, Sarah Oakes,[12] and in it Ms. Oakes shares her view that, based upon her experiences working with Ms. Vance in the University's catering department, it is Ms. Vance who is a racist. Exh. 53 (Oakes Article). The second article, captioned, "BSU employee claims she was threatened," was published on March 5, 2008, in the "News" section. The article contains basic

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[12] In her supplemental affidavit, filed on March 12, 2008, Ms. Vance alleged that, in addition to writing the article, on March 1, 2008, Ms. Oakes was "lurking in [her] work area, banging things loudly, and acting to intimidate [her]." Vance Supp. Aff. ¶ 14. According to Ms. Vance, when she reported this behavior to her supervisor, Ana Lisa Padron, Ms. Padron told her that, "this is a common kitchen." *Id.* ¶ 15. Ms. Vance contends that it was only after she told Ms. Padron that she [Ms. Vance] was going to call the police that Ms. Padron escorted Ms. Oakes out of the kitchen. *Id.* ¶¶ 16-17.

information regarding Ms. Vance's report to the Ball State Police Department that she and a co-worker had been involved in a verbal altercation with two other people not affiliated with the University. Exh. 54 (Rush Article). Ms. Vance also submitted the comments readers posted in response to these articles – some of which are sympathetic to Ms. Vance, while others are openly racist and even threatening.[13] Ms. Vance contends that the fact that the University has allowed the comments appearing on the newspaper's electronic billboard to remain posted for its employees, its students, and the public to see has only exacerbated her hostile work environment.

Legal Analysis

I. Standard of Review

Summary judgment is appropriate when the record shows that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Disputes concerning material facts are genuine where the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In deciding whether genuine issues of

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[13] For example, one reader advises Ms. Oakes to "[b]ait [M]s. Vance into a physical altercation, make sure others see her strike you first, then beat that loudmouth down, in self defense." Exh. 53 (Oakes Article Comments). Another states that "[V]ance needs to go back to the east side and sell some crack." *Id.*

material fact exist, the court construes all facts in a light most favorable to the non-moving party and draws all reasonable inferences in favor of the non-moving party. *See id.* at 255. However, neither the "mere existence of some alleged factual dispute between the parties," *id.* at 247, nor the existence of "some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), will defeat a motion for summary judgment. *Michas v. Health Cost Controls of Illinois, Inc.*, 209 F.3d 687, 692 (7th Cir. 2000).

The moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. The party seeking summary judgment on a claim on which the non-moving party bears the burden of proof at trial may discharge its burden by showing an absence of evidence to support the non-moving party's case. *Id.* at 325.

Summary judgment is not a substitute for a trial on the merits, nor is it a vehicle for resolving factual disputes. *Waldridge v. Am. Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994). Thus, after drawing all reasonable inferences from the facts in favor of the non-movant, if genuine doubts remain and a reasonable fact-finder could find for the party opposing the motion, summary judgment is inappropriate. *See Shields Enter., Inc. v. First Chicago Corp.*, 975 F.2d 1290, 1294 (7th Cir. 1992); *Wolf v. City of Fitchburg*, 870 F.2d 1327, 1330 (7th Cir. 1989). But if it is clear that a plaintiff will be unable to satisfy the legal requirements necessary to

establish her case, summary judgment is not only appropriate, but mandated. *See Celotex*, 477 U.S. at 322; *Ziliak v. AstraZeneca LP*, 324 F.3d 518, 520 (7th Cir. 2003). Further, a failure to prove one essential element "necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 323.

Courts often confront cross-motions for summary judgment because Rules 56(a) and (b) of the Federal Rules of Civil Procedure allow both plaintiffs and defendants to move for such relief. "In such situations, courts must consider each party's motion individually to determine if that party has satisfied the summary judgment standard." *Kohl v. Ass'n. of Trial Lawyers of Am.*, 183 F.R.D. 475 (D.Md. 1998). Thus, in determining whether genuine and material factual disputes exist in this case, the Court has considered the parties' respective memoranda and the exhibits attached thereto, and has construed all facts and drawn all reasonable inferences therefrom in the light most favorable to the respective non-movant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

II. Motion to Strike

On March 18, 2008, Defendants moved to strike Ms. Vance's March 12, 2008, submissions, contending that her supplemental filings consist of new factual allegations unrelated to her summary judgment motion and involving individuals not named as defendants. Defendants assert that if Ms. Vance wishes to supplement her complaint allegations, she is required to move to supplement her pleadings pursuant to Federal Rule of Civil

Procedure 15(d),[14] rather than attempting "an end run" around the rule in order to prevent Ball State from defending against the new allegations. Ms. Vance rejoins that she is not attempting to supplement her complaint with additional claims or parties; rather, she claims that she is merely providing new evidence directly relevant to her hostile environment claim already briefed on summary judgment.

We agree with Defendants that Ms. Vance's supplemental submissions lay out facts pertaining to events that allegedly occurred at a time after her complaint was filed and, in fact, after the pending summary judgment motions were fully briefed, even though they arguably relate to a claim (hostile environment) advanced in the original pleading. Thus, as Defendants contend, we find that these supplemental submissions come within the purview of Rule 15(d).[15] It is within the district court's

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[14] Rule 15(d) provides:

> On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

Fed. R. Civ. Pro. 15(d).

[15] Accordingly, rather than merely filing the materials as additional evidence, Ms. Vance's counsel should have moved to supplement the pleadings pursuant

discretion to either allow or deny a supplemental pleading. *Twin Disc, Inc. v. Big Bud Tractor*, 772 F.2d 1329, 1338 (7th Cir. 1985). When a supplemental pleading facilitates the efficient administration of justice, a court should allow it. *Griffin v. County Sch. Bd. of Prince Edwardy County*, 377 U.S. 218, 226-27 (1964). However, a supplemental pleading is properly denied under Rule 15(d) when there is "any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc." *Harris v. Shuman*, 1998 WL 967588, at *3 (7th Cir. 1998) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Glatt v. Chicago Park District*, 87 F.3d 190, 194 (7th Cir. 1996)).

We find that, if we were to allow Ms. Vance to supplement her pleadings with these additional allegations at this point in the proceedings, it would serve to substantially delay the progress of this litigation and prejudice Defendants, as the deadlines for dispositive motions and discovery relating to liability issues have long passed.[16] Furthermore, as

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to Rule 15(d). However, for purposes of this entry, we will proceed with the Rule 15(d) analysis as if Ms. Vance's counsel had done so.

[16] Although the deadline for discovery relating to damages was extended to July 25, 2008, the deadline for discovery relating to liability issues passed on October 12, 2007.

we discuss more fully below, the majority of her new allegations of additional harassment are not even attributable to Ball State, and those that are do not reach the level of significance required to entitle Ms. Vance to relief under Title VII. Thus, even if we were to consider the allegations set forth by Ms. Vance in her supplemental submissions, they would have no effect on our ultimate determination that she is unable to survive summary judgment on her hostile environment claim. For the foregoing reasons, we **GRANT** Defendants' Motion to Strike Ms. Vance's supplemental affidavits and supporting evidence, filed on March 12, 2008.

III. Title VII Claims

Title VII provides that "it shall be an unlawful employment practice for an employer ... to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Ms. Vance makes two related arguments – that she was subjected to a hostile work environment and that she was retaliated against for complaining about unlawful discrimination. We address each of Ms. Vance's claims in turn below.

A. Hostile Work Environment

Ms. Vance contends that Ball State subjected her to a hostile work environment in violation of Title

VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, 42 U.S.C. § 1981, due to her supervisors' direct behavior towards her as well as her supervisors' failure to take prompt remedial action to address her co-worker's alleged harassing behavior and her supervisors' failure to respond to her complaints regarding harassment she allegedly suffered at the hands of third parties. Ball State denies all aspects of this claim, arguing that the alleged conduct by its employees was not objectively hostile, that it was neither severe nor pervasive, that Ball State was not negligent in discovering or remedying the alleged harassment, and that there is no evidence, save for Ms. McVicker's conduct, that the alleged harassment was directed at Ms. Vance because of her race.

In *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986), the Supreme Court clarified that the "terms, conditions, or privileges of employment" language in Title VII encompasses *environmental* conditions of employment, and that the scope of the prohibition "is not limited to 'economic' or 'tangible' discrimination." *Id.* at 64. Therefore, a plaintiff may establish a violation of Title VII by proving that discrimination based on her being a member of a protected class has created for her a hostile or abusive work environment. In order to rise to the level of a hostile work environment that is violative of Title VII, a plaintiff must show: "(1) that the work environment was both subjectively and objectively offensive; (2) that the harassment was based on membership in a protected class; (3) that the conduct was severe or pervasive; and (4) that there is a basis for employer

liability." *Mendenhall v. Mueller Streamline Co.*, 419 F.3d 686, 691 (7th Cir. 2005).

In order to determine whether a working environment is hostile in this sense, courts may consider factors including "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Hilt-Dyson v. City of Chicago*, 282 F.3d 456, 463 (7th Cir. 2002), *cert. denied*, 537 U.S. 820 (2002) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88 (1998)). Conduct that is unpleasant, but is not severe or pervasive, will not constitute a hostile work environment prohibited by Title VII. *See Saxton v. American Telephone and Telegraph Co.*, 10 F.3d 526, 533 (7th Cir. 1993).

1. Whether Ms. Davis Is Ms. Vance's Supervisor

We begin our Title VII ~~analysis with a preliminary issue. As mentioned~~ above, the parties dispute whether Ms. Davis was a supervisor or merely a co-worker of Ms. Vance. Because part of our subsequent analysis turns on this distinction, we address it at the outset of our discussion. For Title VII purposes, "[a] supervisor is someone with the power to directly affect the terms and conditions of the plaintiff's employment." *Rhodes v. Illinois Dep't of Transp.*, 359 F.3d 498, 506 (7th Cir. 2004). That authority "primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee." *Hall v. Bodine Elec. Co.*, 276 F.3d 345, 355 (7th Cir. 2002) (citing *Parkins v. Civil*

Constructors of Illinois, Inc., 163 F.3d 1027, 1034 (7th Cir. 1998)).

Here, Ms. Vance makes no allegations that Ms. Davis possessed any such power. Instead, Ms. Vance contends only that Ms. Davis is "part of management because she doesn't clock in." Vance Dep. at 35.17 Beyond that assertion, Ms. Vance concedes that she does not actually know whether Ms. Davis was one of her managers because "one day she's a supervisor; one day she's not. One day she's to tell people what to do, and one day she's not. It's inconsistent." *Id.* at 84. Even assuming, as Ms. Vance contends, that Ms. Davis periodically had authority to direct the work of other employees, such power would still not be sufficient to establish a supervisory relationship for purposes of Title VII, as there is nothing in the record indicating that Ms. Davis had the ability to "hire, fire, demote, promote, transfer, or discipline" Ms. Vance.

It is well established under Seventh Circuit law that "[a]n employee merely having authority to oversee aspects of another employee's job performance does not qualify as a supervisor in the Title VII context." *Rhodes*, 359 F.3d at 506; see also *Hall*, 276 F.3d at 355 ("[T]he fact that an employer authorized one employee to oversee aspects of another employee's job performance does not establish a Title VII supervisory relationship."). In

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[17] BSU asserts that Ms. Davis is not currently, nor has she ever been, a supervisor. Rubrecht Aff. ¶ 9 ("At all pertinent times she has been an hourly employee serving as a catering specialist.").

both *Rhodes* and *Hall*, the harassers in question were determined not to be supervisors, despite having much more authority over other employees than Ms. Davis is alleged to have had here, including the power to direct the plaintiffs' work duties, provide input into their performance evaluations, recommend discipline, and train the plaintiffs and other less-experienced employees. For the foregoing reasons, we find that, for purposes of this Title VII analysis, Ms. Davis was Ms. Vance's co-worker, not one of her supervisors. On that premise, we address Ms. Vance's allegations against her.

2. Supervisor Harassment

We first consider Ms. Vance's allegations against those persons who actually were her supervisors. Defendants contend that the harassment Ms. Vance alleges she was subjected to by her supervisors was neither sufficiently severe nor pervasive to be actionable and that none of the alleged harassment was racial in character or purpose. We agree. For the reasons detailed below, we find that the incidents attributed to Ms. Vance's supervisors, Ms. Adkins and Mr. Kimes, are not sufficiently connected to Ms. Vance's race so as to satisfy the second element of the hostile environment analysis, nor are they sufficiently severe or pervasive to be considered objectively hostile.

In order for Ms. Vance to demonstrate that the harassment she alleges she experienced was based on her membership in a protected class, the conduct in question "must have a racial character or purpose to support a hostile work environment claim." *Luckie v. Ameritech Corp.*, 389 F.3d 708, 713 (7th Cir. 2004)

(citing *Hardin v. S.C. Johnson & Son, Inc.*, 167 F.3d 340, 345 (7th Cir. 1999)). Our review of Ms. Vance's allegations that directly implicate Ms. Adkins leads us to conclude that the only complained-of incident was not of a racial character. The only concrete allegation made by Ms. Vance against Ms. Adkins is that she (Ms. Adkins) "mean-mugged" and stared at Ms. Vance on one occasion while they were both in the kitchen. Although it is obvious that Ms. Vance found this alleged behavior unwelcome, no reasonable jury could find that this incident was racial in character or purpose. Further, neither this event nor the others complained of by Ms. Vance was sufficiently severe or pervasive to be actionable. There is no evidence in the record to suggest that Ms. Adkins consistently engaged in this sort of behavior, nor can we in any event conclude that the making of an unkind face is either physically threatening or humiliating.

The same holds true for the alleged harassment by Mr. Kimes. Ms. Vance contends that on one occasion Mr. Kimes physically stood in front of a doorway to keep her from leaving a room and on another occasion, when he did not hear her answer a question he had asked, he walked toward her and repeated the question over and over in a threatening manner. Vance Dep. at 100; BSU 001997. Although Ms. Vance was no doubt upset by these encounters, she has presented no evidence to support the conclusion that Mr. Kimes engaged in these behaviors because of her race. Ms. Vance also contends that Mr. Kimes consistently treats her more poorly than her co-employees by yelling at her, giving her less desirable shifts, and simply treating

her differently. However, the factual record adduced here does not support the conclusion that, if true, such treatment is due to the fact that she is African-American. There appears to be agreement among Ms. Vance's co-workers that Mr. Kimes is often a difficult supervisor for whom to work and sometimes plays favorites among employees. Some of Ms. Vance's co-workers testified that Mr. Kimes's treatment of Ms. Vance resulted in "tension" in the work place (Amos Statement ¶ 11; Murphy Statement ¶ 20) and a "stressful work environment" (Ring Statement ¶ 9). However, they never attributed Mr. Kimes's treatment of Ms. Vance to her race. In fact, Ms. Amos specifically testified that she has "never heard or seen Bill Kimes do or say something that indicates he is a racist, and I do not believe he is a racist." Amos Aff. ¶ 5.

Additionally, the facts before the Court demonstrate that Ms. Vance (for that matter, other African-American employees as well) are not Mr. Kimes's only targets. Butch Parker, one of Ms. Vance's former co-workers (who is also African-American), testified that, although Mr. Kimes has an "intimidating bullying type" personality and that "he seemed to have favorites" of which Ms. Vance was not one, Mr. Kimes treated a number of other employees equally badly regardless of race, including himself, Patsy Amos, David Ring, and Julie Murphy. Parker Dep. at 16-17, 19-24. Another of Ms. Vance's co-workers, Ms. Amos, testified similarly, stating that "Bill Kimes has favorites among the employees and picks on others. I believe he picks on Maetta Vance, me, and others. . . . He could pick on anyone depending on the day. This has caused a number of

employees to leave, including Teresa Pickett, Denel Anderson, Deb Whitney, and Andrea, whose last name I do not recall." Amos Aff. ¶ 4, ¶ 6. While we obviously do not condone Mr. Kimes's difficult demeanor, it appears that he is an example of an "equal opportunity harasser" and, as such, his behavior falls outside the reach of Title VII. *See, e.g., Holman v. Indiana*, 211 F.3d 399, 403 (7th Cir. 2000) ("Because Title VII is premised on eliminating discrimination, inappropriate conduct that is inflicted on [all races], or is inflicted regardless of [race] is outside the statute's ambit.") (addressing sexual harassment).

Ms. Vance does attribute one comment to Mr. Kimes that has a racial character. She alleges that, on one occasion, Mr. Kimes told Ms. Courtright that his new employee (Butch Parker) is African-American and that he was "concerned that Maetta Vance will attempt to create an alliance with him." Parker Dep. at 32-33. However, this solitary comment, allegedly uttered on a single occasion outside the presence of Ms. Vance is insufficient to establish a hostile work environment, especially considering that there has been no allegation that Ms. Vance was even aware of the comment before she commenced this litigation.

Because there is no evidence allowing a jury to find that Ms. Adkin's and Mr. Kimes's alleged behavior was based on race or was sufficiently severe and pervasive to be considered objectively hostile, no issue of material fact exists as to whether one of Ms. Vance's supervisors contributed to the hostile environment of which she complains and this part of her Title VII claim must be dismissed. We proceed

next to address the harassment Ms. Vance contends she suffered at the hands of her co-employees.

3. Co-Employee Harassment

Ms. Vance attributes various instances of race-based harassment to her co-workers, Ms. Davis and Ms. McVicker, which allegations we address below.

Allegations Against Ms. Davis

The majority of the incidents of alleged harassment on the part of Ms. Davis have no racial character or purpose, including, *inter alia*, Ms. Davis's alleged comment that she would "do it again"[18] and various other allegations of staring, laughing, and banging pots and pans in a noisy, irritating fashion. Ms. Vance alleges only two incidents that could arguably be related to race. On one occasion, Ms. Vance contends, she overheard Ms. Davis making a joke about Buckwheat and Sambo while looking at her (Ms. Vance). Another time, Ms. Vance reports that Ms. Davis asked, in a Southern accent, "Are you scared?" However, assuming the

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[18] Ms. Vance contends that this statement is in reference to a prior alleged altercation that took place either in 1999 or 2001 between Ms. Vance and Ms. Davis in which Ms. Vance alleges that Ms. Davis hit her. Putting aside the statute of limitations problem (Ms. Vance filed her first EEOC charge on January 5, 2006, meaning that her actionable claims had to have occurred within 300 days prior to that filing, on or after February 8, 2005), there is no indication that, even if true, either of these incidents occurred because of Ms. Vance's race.

truthfulness of these facts as we must, these two incidents are not sufficiently severe or pervasive to support a hostile environment claim. Further, even if they were, Ms. Vance must still meet the fourth prong of the hostile environment analysis, to wit, that there is a basis for employer liability. That she is unable to do.

Employer liability "turns on whether the alleged harasser was the plaintiff's supervisor, instead of a mere co-worker." *Rhodes v. Illinois Dep't of Transp.*, 359 F.3d 498, 505 (7th Cir. 2004). Employers are "essentially strictly liable if the employee's supervisor created the hostile work environment." *Mason v. Southern Illinois University at Carbondale*, 233 F.3d 1036, 1043 (7th Cir. 2000). However, when the harasser is a co-employee, an employer can be held liable only if it has "been negligent either in discovering or remedying the harassment." *Parkins v. Civil Constructors of Illinois, Inc.*, 163 F.3d 1027, 1032 (7th Cir. 1998) (quoting *Perry v. Harris Chernin, Inc.*, 126 F.3d 1010, 1013 (7th Cir. 1997)). Once an employer is made aware of the problem, "the employer can avoid liability for its employees' harassment if it takes prompt and appropriate corrective action reasonably likely to prevent the harassment from recurring." *Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965, 978 (7th Cir. 2004) (quoting *Tutman v. WBBM-TV, Inc./CBS, Inc.*, 209 F.3d 1044, 1048 (7th Cir. 2000)).

There is no basis for employer liability based on either the Buckwheat and Sambo remarks or the allegedly racially-based comment. Ms. Vance concedes that she probably did not mention that she had overheard the Buckwheat and Sambo references

in any of her complaints, nor does she allege that Ball State was negligent in discovering the incident. However, Ms. Vance did report the altercation during which Ms. Davis asked her if she was scared. After investigating, Ball State determined that Ms. Vance's account was largely corroborated by the witness named by Ms. Vance. Although the University did not consider the statement to be related to race, it nevertheless issued Ms. Davis a warning as a sanction for her conduct. In light of the relatively innocuous nature of the encounter, we find that Ball State's discipline was reasonably calculated to foreclose subsequent harassment. For the above reasons, we are unable to find that Ms. Vance has adduced any issue of material fact concerning whether Ms. Davis contributed to the hostile environment to which she contends she was subjected.

Allegations Against Ms. McVicker

Ms. Vance contends, and Defendants concede, that Ms. McVicker used racially derogatory language, including referring to African-American employees and Ball State students as "niggers," and commenting about her [Ms. McVicker's] family's ties to the Ku Klux Klan. There is no doubt that Ms. McVicker's comments were and are clearly offensive; however, we find that, while deplorable, her behavior does not rise to the level of actionable harassment as defined under Title VII.

The Seventh Circuit recognizes that the use of the word "nigger" can be extremely disturbing to the listener and that, "while there is no 'magic number' of slurs that indicate a hostile work environment,

[the use of] an unambiguously racial epithet falls on the 'more severe' end of the spectrum." *Cerros v. Steel Technologies, Inc.*, 288 F.3d 1040, 1047 (7th Cir. 2002) (quoting *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 674-75 (7th Cir. 1993)). Thus, "a plaintiff's repeated subjection to or hearing that word could lead a reasonable factfinder to conclude that a working environment was objectively hostile." *Hrobowski v. Worthington Steel Co.*, 358 F.3d 473, 477 (7th Cir. 2004).

In determining the severity of racial epithets, the Seventh Circuit also considers whether they were directed at or uttered in the presence of the plaintiff. Although still relevant to the hostile work environment analysis, the Seventh Circuit has held that "when harassment is directed at someone other than the plaintiff, the impact of [such] 'secondhand harassment' is obviously not as great as the impact of harassment directed at the plaintiff." *Smith v. Northeaster Illinois University*, 388 F.3d 559, 567 (7th Cir. 2004). Here, Ms. McVicker did not direct her comments at Ms. Vance, nor did Ms. Vance personally hear Ms. McVicker utter the word "nigger" or refer to her [Ms. McVicker's] family's connections with the Ku Klux Klan. Instead, she heard of those things only through her co-workers. As such, Ms. Vance was not repeatedly subjected to hearing that term directed at her, nor did she personally hear it uttered by Ms. McVicker.

Beyond the above allegations, Ms. Vance contends that Ms. McVicker called her a monkey on one

occasion[19] and engaged in other unwelcome behavior, including staring, laughing, and making the remark "payback." While Ms. McVicker's behavior is obviously offensive and unacceptable, we cannot find that these incidents, taken together, are sufficiently severe or pervasive to have created an objectively hostile working environment.

Further, even if we had concluded that the harassment Ms. Vance suffered at the hands of Ms. McVicker was sufficiently severe or pervasive to be objectively hostile, we would still have to find a basis for attributing liability to Ball State. No such basis exists here. After learning that Ms. McVicker was using racially derogatory language and verifying that allegation through an investigation, Ball State took disciplinary action against Ms. McVicker. As discussed above, Ball State utilizes a four-step progressive discipline plan according to which a verbal warning is normally the first step. Not only did Ball State decide that Ms. McVicker's behavior was sufficiently severe to warrant a second-step written warning, but Ms. Courtright also took Ms. McVicker aside to talk to her further about her conduct and suggest that Ms. McVicker consider

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[19] One of Ms. Vance's co-workers, Ms. Amos, testified that she heard Ms. McVicker call Ms. Vance a "porch monkey" on another occasion. Amos Aff. ¶ 7. However, Ms. Amos did not report this incident to any of her supervisors. Additionally, it is unclear from the record exactly when Ms. Amos heard Ms. McVicker make this statement or whether Ms. Vance was aware of this statement before the commencement of the instant litigation.

bidding on a different job so that she and Ms. Vance could remain separated.[20] Additionally, although not always successful, Mr. Kimes undertook to try to schedule Ms. McVicker and Ms. Vance on separate shifts so that their contacts with one another would be further limited.

Ms. Vance contends that, even after the discipline, Ms. McVicker continued to harass her (staring and laughing at her, saying "payback" on the elevator, and calling her a monkey) and that Ball State should have taken additional corrective action, such as separating her from Ms. McVicker sooner or terminating Ms. McVicker for her behavior in order to prevent future harassment. However, Ball State is not held to such a standard in avoiding liability under Title VII. As the Seventh Circuit has ruled, "Title VII does not require that the employer's responses to a plaintiff's complaints of . . . harassment successfully prevented subsequent harassment, only that the employer's actions were reasonably likely to check future harassment." *Savino v. C.P. Hall Co.*, 199 F.3d 925, 933 (7th Cir. 1999) (citations omitted) (addressing sexual

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[20] Ball State contends that it transferred Ms. McVicker to another department in order to address the problems with Ms. Vance. However, Ms. Vance's original complaint was made in 2005 and Ms. McVicker did not transfer to Cardinal Crossing until 2007. Additionally, it appears that transfer was instigated by Ms. McVicker's decision to bid on the job, rather than on any action taken by Ball State. Therefore, we do not include the fact of Ms. McVicker's transfer in our analysis of the disciplinary measures taken by Ball State.

harassment). On the basis of the evidence adduced here, we find that Ball State's preventative measures were reasonably calculated to foreclose subsequent harassment.

Ms. Vance contends that she continued to complain about additional harassment inflicted by Ms. McVicker after she [Ms. McVicker] received the written warning and Ball State failed to address her concerns. However, the factual record does not support such a factual finding. Ms. Vance claims that Ms. McVicker called her a monkey at some time subsequent to her initial complaint and that she reported the incident the same day that Ms. McVicker received her written warning, but Ball State never issued Ms. McVicker further discipline and apparently did not take her complaint seriously. However, the record reflects that Mr. Kimes investigated the incident and interviewed the witness whom Ms. Vance had identified, but when inquired of, the witness could not corroborate Ms. Vance's account. Mr. Kimes reported back to Ms. Vance that, because there were no witnesses to substantiate her claim, it was merely a "she said-she said exchange." Nevertheless, he offered to continue to pursue the issue if she wanted him to do so. Ball State took similar actions with respect to the remainder of Ms. Vance's complaints (none of which involved racial epithets or racially derogatory language), thoroughly investigating the alleged incidents and interviewing the named witnesses. Ms. McVicker denied the later allegations and in response levied her own set of accusations against Ms. Vance. Because Ball State could not corroborate either Ms. Vance's or Ms. McVicker's accounts, no

further disciplinary action appears to have been taken against Ms. McVicker. Under these facts, there is but one conclusion: Ball State properly investigated the incidents and, when possible and as necessary, took prompt and appropriate action reasonably calculated to prevent the harassment from recurring.

For the foregoing reasons, we hold that the harassment Ms. Vance alleges she was subjected to by her co-workers is neither sufficiently severe nor pervasive to be considered objectively hostile for the purposes of Title VII. Additionally, even if it were, we are unable to attribute liability to Ball State because we cannot find that it was negligent either in discovering or remedying the harassment.[21] Thus,

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[21] In her March 12, 2008, submissions, Ms. Vance set forth various allegations of harassment against third parties, including Ms. Davis's family members and a number of anonymous individuals who posted racially derogatory comments on the website of Ball State's online student newspaper, contending that Ball State should be held liable for its failure to take action to address these incidents. Although we have stricken those submissions from the record for reasons previously discussed, even had we considered them in our analysis, they would have had no affect on the result reached.

According to the EEOC guidelines, an employer may be responsible for the acts of non-employees, with respect to racial discrimination in the workplace, where the employer knows or should have known of the conduct and fails to take immediate and appropriate corrective action, *depending on the control and other legal responsibility the employer may have over such non-employees. See* 29 C.F.R. § 1604.11(e) (emphasis added). Here, Ball State

we DENY Plaintiff's Partial Motion for Summary Judgment and GRANT Defendants' Motion for

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could not be held liable for the third party actions alleged by Ms. Vance because the University had no control over the alleged perpetrators.

Although Ms. Vance claims that Ms. Davis was present when the incident involving Ms. Davis's family occurred, the racially derogatory language was allegedly uttered, not by Ms. Davis or another Ball State employee, but by private citizens over whom the University apparently had no control. Additionally, the alleged confrontation took place outside of the workplace, while Ms. Vance was on a break, with none of Ms. Vance's supervisors present. Ms. Vance has made no allegation that, by the time Ms. Vance reported the incident to Mr. Kimes, she was still being harassed by Ms. Davis's family, or even that Ms. Davis's husband and daughter were still on the premises. As Judge Hamilton recognized in *Fulmore v. Home Depot, U.S.A., Inc.*, "While the racial harassment of employees by [third parties] is deplorable and not to be tolerated, neither this court nor any other has imposed upon employers the obligation to reprimand or otherwise punish [third parties] over whom they have no control for harassing behavior when the employee is no longer being subjected to the harassment." 2006 WL 839464, at *17 (S.D. Ind. March 30, 2006).

The same analysis applies to the anonymous online posters. Ball State has no effective control over what anonymous individuals post on an electronic billboard. In addition, efforts to impose such controls would clearly implicate First Amendment concerns. In short, such comments are not attributable to Ball State, and the University is not liable under Title VII merely for its failure to remove the offending material.

Summary Judgment on Ms. Vance's hostile environment claim.[22]

B. Retaliation

Ms. Vance also claims that Ball State unlawfully retaliated against her, when she received less significant kitchen duties, fewer opportunities for overtime hours, and was subject to unequal discipline subsequent to her having filed her EEOC charges. Under Title VII, it is unlawful "for an employer to discriminate against any of [its] employees ... because [the employee] has opposed any practice made an unlawful employment practice by [Title VII]." 42 U.S.C. § 2000e-3(a). A plaintiff has two methods of proof available to him or her to demonstrate retaliation. A plaintiff may prove retaliation either through the direct method of proof or the indirect method, also called the "burden-shifting" method. *See Tomanovich v. City of Indianapolis and Indiana Dep't of Transp.*, No. 05-1653, slip op. at 6 (7th Cir. Aug. 8, 2006); *Moser v.*

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[22] Under the same facts relied upon for her hostile environment claim, Ms. Vance brought suit against Defendants, Ms. Adkins, Mr. Kimes, Ms. Davis, and Ms. McVicker, in their individual capacities, pursuant to § 1983. Because claims brought pursuant to § 1983 generally follow the contours of Title VII claims, the Seventh Circuit holds that such claims "should be analyzed in the same way and the same standard of liability should be imposed." *Burks v. Wisconsin Dep't of Transp.*, 464 F.3d 744, 751 n.2 (7th Cir. 2006) (citations omitted). Therefore, we also **GRANT** Defendants' Motion for Summary Judgment on the § 1983 individual capacity claims.

Ind. Dep't of Corr., 406 F.3d 895, 903 (7th Cir. 2005). The parties appear to have addressed only the indirect framework in their briefs, so we shall follow their lead and proceed solely with that analysis.

Under the burden-shifting method, an employee must establish a *prima facie* case of retaliation by proving that she: "(1) engaged in a statutorily protected activity; (2) met her employer's legitimate expectations; (3) suffered an adverse employment action; and (4) was treated less favorably than similarly situated employees who did not engage in statutorily protected activity." *Caskey v. Colgate-Palmolive Co.*, 535 F.3d 585 (7th Cir. July 24, 2008) (citing *Nichols v. Southern Illinois University-Edwardsville*, 510 F.3d 772, 784-85 (7th Cir. 2007)). If the plaintiff can establish the existence of these four factors, the burden of production shifts to the employer to demonstrate a valid non-discriminatory reason for the action it took against the plaintiff. *Id.*

If the employer can demonstrate such a valid reason, the burden of production shifts back to the plaintiff to demonstrate that the reason given was merely a pretext for the unlawful retaliation. *Tomanovich* at 7 (citing *Moser*, 406 F.3d at 904). "A plaintiff can establish pretext by showing either that a discriminatory reason more likely motivated the employer or that the employer's proffered explanation is unworthy of credence." *Rand v. CF Industries, Inc.*, 42 F.3d 1139, 1145 (7th Cir. 1994). As this Court has noted previously, "A 'pretext' is not merely a mistake or an imprudent reason; it is a false reason or a dishonest explanation, which, because of its falseness or dishonesty, raises a question as to whether the employer is hiding a

discriminatory motive." *Rice v. Indiana State Police*, 149 F.Supp.2d 573, 581 (S.D. Ind. 2001).

1. Diminished Kitchen Duties

Ms. Vance contends that in retaliation for the charges she filed with the EEOC, when she became a full-time employee in January 2007, her supervisors reassigned her to tasks in the kitchen that were menial and less significant compared to her prior duties. Since that time, Ms. Vance asserts that Mr. Hutson, who has the same position and job description as Ms. Vance, is consistently asked to direct the preparation of entire meals even though he does not have as much experience as Ms. Vance.[23] Ball State rejoins that Ms. Vance is unable to make a *prima facie* case of retaliation because she has not shown that she suffered an adverse employment action, nor has she identified a similarly situated employee who received more favorable treatment.

Initially, Defendants assert that Ms. Vance is unable to cite any termination, reduction in pay, demotion, failure to promote, or any other such material change in her employment that would constitute an adverse employment action. Instead, Ball State highlights the fact that, in the midst of

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[23] Ms. Vance also claims, quite cursorily, that Ms. Davis has been given the baking duties that were previously hers. Even if this argument had been fully developed, we are unable to find that Ms. Vance and Ms. Davis are sufficiently similar for Title VII purposes because they do not hold the same position (Ms. Vance is a Catering Assistant, while Ms. Davis is a Catering Specialist).

Ms. Vance's allegations that she was being subjected to harassment based on her race, she bid on and received a full-time catering position (she had previously been part-time), which included approximately $9,492.00 in annual benefits that she had not received as a part-time employee. Ms. Vance does not dispute these facts, but contends that, despite receiving the full-time position, she has nevertheless suffered an adverse employment action because she was reassigned from complex baking tasks to entry level work.

It is true that the Seventh Circuit recognizes that "reassignment with significantly different responsibilities" can be an actionable adverse employment action. *See Stutler v. Illinois Dep't of Corrections*, 263 F.3d 698, 703 (7th Cir. 2001). However, the Supreme Court has made it clear that "reassignment of job duties is not automatically actionable." *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 72 (2006). The determination is fact-specific and "should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'" *Id.* (quoting *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (1998)). Although a close call, we find that a jury could reasonably conclude that the kind of complete reassignment of responsibilities Ms. Vance has described would have been materially adverse to a reasonable employee, considering that baking duties likely require more qualifications and would be considered more prestigious than the entry level work to which Ms. Vance contends she was assigned.

However, we are unable to find that Ms. Vance has met the fourth prong of the *prima facie* analysis, to wit, that she was treated less favorably than a similarly situated employee who did not engage in statutorily protected activity. Although Ball State appears to concede that Ms. Vance and Mr. Hutson are similarly situated for purposes of this claim, it contends that Ms. Vance is nevertheless unable to demonstrate that Mr. Hutson received more favorable treatment than she, since they both received the same types of assignments in the kitchen. Ms. Vance alleges that she had been relegated to cutting vegetables and preparing salads, while Mr. Hutson was given the responsiblity for preparing entire meals; however, the documentary evidence in the record does not support this contention. The chef, Shannon Fultz, prepares daily "prep sheets" for every employee for each work day, detailing the assignments. Our review of the prep sheets prepared by Ms. Fultz for Ms. Vance and Mr. Hutson from February 2007 to August 2007 reveals no significant differences. While it is true that Ms. Vance and Mr. Hutson were not always assigned identical tasks each day, both were given substantially similar responsibilities that included a combination of easier and more complex tasks to complete on a daily basis.[24] For example, both Ms.

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[24] Additionally, even if, as Ms. Vance claims, the prep sheets did not always reflect the work that actually wound up being done (because tasks can be reassigned by Mr. Kimes and Ms. Fultz), the fact that Ms. Vance and Mr. Hutson may occasionally receive different assignments is not sufficiently significant to alter our analysis.

Vance's and Mr. Hutson's daily prep sheets included entry level tasks such as preparing salads and cutting fruit or vegetables, but they also both received assignments to prepare more complicated entrees and side dishes. *See* Exh. JJJ and Exh. LLL. On the whole, we see no meaningful differences that could lead a reasonable jury to conclude that Mr. Hutson received more favorable assignments than Ms. Vance.

Because our review of the record does not disclose any genuine issues of material fact regarding whether Ms. Vance received less favorable treatment than did Mr. Hutson, we **GRANT** Defendants' Motion for Summary Judgment on Ms. Vance's claim that Ball State retaliated against her by reassigning her to more menial tasks in the kitchen.

2. Overtime Hours

Ms. Vance next claims that Ball State retaliated against her by giving her fewer overtime hours than her co-worker, Mr. Hutson.[25] Ball State does not dispute that there is a discrepancy between Ms. Vance's and Mr. Hutson's overtime hours. However, the University contends that this is due, not to retaliation, but to the fact that Ms. Vance was often unavailable to work overtime hours. Ball State also asserts that, because Ms. Vance was absent from work significantly more often than Mr. Hutson, the

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[25] Ms. Vance also alleges that, on a number of occasions, she worked through her lunch hour or breaks but was not compensated for that time. However, after a careful review of the record, we find no substantiation for this contention.

two cannot be considered similarly situated. We agree that Ms. Vance's claim that Ball State retaliated against her by affording her fewer overtime hours than Mr. Hutson fails because Ms. Vance is unable to demonstrate that Mr. Hutson is similarly situated to her, as required by the fourth prong of the indirect analysis.[26] Additionally, even if Ms. Vance had made out a *prima facie* case of retaliation, she has been unable to show that Ball States's proffered explanation for the hours discrepancy between Ms. Vance and Mr. Hutson is mere pretext.

In order for an employee to be similarly situated to a plaintiff for purposes of proving a Title VII retaliation claim, a plaintiff "must show that there is someone who is directly comparable to her in all

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[26] The parties do not address the issue of whether a denial of overtime constitutes an adverse employment action sufficient to implicate Title VII. Although it does not appear that this issue has been directly addressed by the Seventh Circuit, the Court of Appeals has held "that a denial of a raise can be an adverse employment action while the denial of a 'more transient' payment such as a bonus is not." *Lewis v. City of Chicago*, 496, F.3d 645, 653 (7th Cir. 2007) (citations omitted). Further, the Seventh Circuit recognizes that, "[d]epending on the type of work, overtime can be a significant and recurring part of an employee's total earnings similar to a recurring raise or it could be insignificant and nonrecurring like a discretionary bonus." *Id.* at 654. It appears in this case, that Ball State's overtime opportunities are more similar to a recurring raise than a discretionary bonus, and therefore, we assume for purposes of this motion that Ms. Davis has suffered an adverse employment action.

material respects." *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 680 (7th Cir. 2002). While "[a] similarly situated employee need not be 'identical,' . . . the plaintiff must show that the other employee dealt with the same supervisor, [was] subject to the same standards, and had engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish [her] conduct or the employer's treatment of [her]." *Caskey*, 535 F.3d at 585 (citations omitted). There is no dispute that Ms. Vance and Mr. Hutson shared the same supervisor and were subject to the same standards in the workplace.

However, unlike Mr. Hutson, Ms. Vance was often either absent from work or unavailable to work certain hours. It is undisputed that Ms. Vance took fairly frequent leave, pursuant to the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq.* ("FMLA"), sometimes leaving unexpectedly in the middle of the day, other times calling in to report that she would not be able to work that day.[27] Although the University is obviously prohibited from using Ms. Vance's exercise of her statutorily protected leave against her (Ball State approved the FMLA leave in each instance), if she is absent at times when overtime is needed, it follows that she would not have the opportunity to be offered the hours on those instances if she were not present at

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[27] For example, between January 1, 2007, and October 29, 2007, Ms. Vance took FMLA time (either a full day or a number of hours) on 70 different work days, out of approximately 215 possible days she could have worked. Exh. DDD (Absence Record).

work or was unavailable to work the necessary hours. There is no allegation that Mr. Hutson was similarly absent or unavailable at times when overtime was offered. The fact that Ms. Vance was unavailable to work certain hours and absent from work significantly more often than Mr. Hutson differentiates Mr. Hutson from Ms. Vance, rendering them dissimilar for any relevant comparison. Thus, because Ms. Vance is unable to identify a similarly-situated employee who received more favorable treatment and had not engaged in statutorily protected activity, she is unable to make out a *prima facie* case of retaliation.

Even if we had concluded that Ms. Vance had established an entitlement to proceed past the *prima facie* stage on her overtime hours claim, the burden would then shift to Ball State to provide a legitimate, nondiscriminatory reason for the discrepancy. Here, the University has done so, contending that the reason Mr. Hutson received more overtime hours than Ms. Vance is that he was present at work and available to take the hours on a more consistent basis. Ms. Vance rejoins that Ball State's explanation is merely pretext for retaliation because even on the days when she has been available and not on FMLA leave, she did not receive the first offer to take overtime, despite having significantly fewer over-time hours than Mr. Hutson.[28]

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[28] Ball State keeps equalization charts of its employees' overtime hours because it is required to distribute overtime "as equitably as possible." Rubrecht Supp. Aff. ¶ 7 (citing Section 4.A of Ball State's Overtime Agreement).

However, Ball State introduced evidence of an "Overtime Agreement" between the University and the union, which contains, *inter alia*, a "work continuation" provision. Under this provision, when over-time is needed to complete a specific task, the bar-gaining unit employee who originally started the task during normal hours must be the employee who finishes that task, if it requires overtime hours. Rubrecht Supp. Aff. ¶ 8 (citing Section 4.F of the Overtime Agreement). It is only in situations when the work continuation provision does not apply that employees with fewer overtime hours receive priority. Therefore, because Mr. Hutson was available for work more regularly than Ms. Vance, Mr. Hutson was more likely to be the only full-time catering assistant on duty on a given day, which often invoked the work continuation provision in Mr. Hutson's favor, affording him more opportunities for overtime. Additionally, even on the days when Ms. Vance was at work and could take the overtime, if the work continuation provision applied in favor of Mr. Hutson, she still could not be offered the overtime over Mr. Hutson, regardless of how many fewer hours she had.

Furthermore, as Ball State argues (and Ms. Vance does not dispute), Ms. Vance initially raised the issue of her lack of overtime hours before she ever filed charges with the EEOC, which further bolsters the University's claim that its unequal distribution of overtime hours was not, in fact, in retaliation for Ms. Vance having engaged in a statutorily protected activity. In short, we find that a reasonable fact-finder could not conclude that Ms. Vance's having received fewer overtime hours than

Mr. Hutson was more likely motivated by discriminatory reasons than by Ball State's legitimate nondiscriminatory reason. Thus, for the foregoing reasons, we **GRANT** Defendants' Motion for Summary Judgment on Ms. Vance's retaliation claim pursuant to the overtime hour discrepancy.

3. Unequal Discipline

Ms. Vance also fails to make out a *prima facie* case for retaliation on her theory that she was subject to unequal discipline following the filing of her EEOC charges. In support of this theory, Ms. Vance points to the fact that, on September 28, 2007, she was issued a verbal warning for allegedly slamming a pan down behind another employee and splattering gravy on Ms. Davis, even though Ms. Vance denied throwing gravy and no witnesses saw her do so. In contrast, Ms. Vance contends that, when she reported incidents of harassment under similar circumstances (*e.g.*, no witnesses, allegations denied, etc.) against employees who had not filed EEOC charges, her supervisors failed to implement discipline against them.

Initially, we note that we are not convinced that BSU treated the complaint against Ms. Vance differently than it treated complaints brought by Ms. Vance against other employees. However, even if the complaint against Ms. Vance were treated more favorably on this occasion than her complaints against others, we cannot find that Ms. Vance has suffered an adverse employment action sufficient to evoke Title VII protections and remedies. "An 'adverse employment action' is an employment action that is likely to dissuade a reasonable worker from

making or supporting a charge of discrimination." *Matthews v. Wisconsin Energy Corp.*, ___ F.3d ___ , 2008 WL 2639152, at *9 (7th Cir. July 7, 2008) (citations omitted). The Seventh Circuit has made it clear that "not everything that makes an employee unhappy will suffice to meet the adverse action requirement. . . . Rather, an employee must show that material harm has resulted from . . . the challenged actions." *Traylor v. Brown*, 295 F.3d 783, 788 (7th Cir. 2002) (internal quotations omitted). In other words, "the challenged action must result in some significant change in employment status." *Bell v. EPA*, 232 F.3d 546, 555 (7th Cir. 2000). In the Seventh Circuit, a plaintiff must demonstrate that he or she was subject to "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly responsibilities, or a decision causing a significant change in benefits." *Mackenzie v. Potter*, 219 Fed. Appx. 500, 503 (7th Cir. 2007).

Here, Ms. Vance received only a verbal warning regarding the alleged behavior; she was not terminated or demoted, nor were her pay or benefits affected. In short, Ms. Vance is unable to show that she suffered any material harm as a result of receiving a single verbal warning and consequently she is unable to satisfy the second prong of the indirect analysis, to wit, that she suffered an adverse employment action. It is well established that, "[f]ailure to satisfy any one element of the prima facie case is fatal to an employee's retaliation claim." *Sublett v. John Wiley & Sons, Inc.*, 463 F.3d 731, 740 (7th Cir. 2006) (quoting *Hudson v. Chicago Transit Authority*, 375 F.3d 552, 560 (7th Cir. 2004)).

Because Ms. Vance was unable to demonstrate that the verbal warning she received constituted an adverse employment action, we shall **GRANT** Defendants' Motion for Summary Judgment as to Ms. Vance's claim that the unequal discipline she faced was retaliatory.

V. Conclusion

For the reasons detailed above, we **DENY** Plaintiff's Motion for Oral Argument; **GRANT** Defendants' Motion to Strike; **DENY** Plaintiff's Partial Motion for Summary Judgment; and **GRANT** Defendants' Motion for Summary Judgment in its entirety. Final judgment will be entered accordingly.

IT IS SO ORDERED.

Date: 09/10/2008

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

APPENDIX C

Equal Employment Opportunity Commission Enforcement Guidance

1999 WL 33305874 (E.E.O.C. Guidance)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ENFORCEMENT GUIDANCE

ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS

June 18, 1999

Number 915.002

1. SUBJECT: Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors

2. PURPOSE: This document provides guidance regarding employer liability for harassment by supervisors based on sex, race, color, religion, national origin, age, disability, or protected activity.

3. EFFECTIVE DATE: Upon receipt.

4. EXPIRATION DATE: As an exception to EEOC Order 205.001, Appendix B, Attachment 4, § a(5), this Notice will remain in effect until rescinded or superseded.

5. ORIGINATOR: Title VII/EPA/ADEA Division, Office of Legal Counsel.

6. INSTRUCTIONS: File after Section 615 of Volume II of the Compliance Manual.

Ida L. Castro, Chairwoman

I. Introduction

In *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998), and *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998), the Supreme Court made clear that employers are subject to vicarious liability for unlawful harassment by supervisors. The standard of liability set forth in these decisions is premised on two principles: 1) an employer is responsible for the acts of its supervisors, and 2) employers should be encouraged to prevent harassment and employees should be encouraged to avoid or limit the harm from harassment. In order to accommodate these principles, the Court held that an employer is always liable for a supervisor's harassment if it culminates in a tangible employment action. However, if it does not, the employer may be able to avoid liability or limit damages by establishing an affirmative defense that includes two necessary elements:

(a) the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and

(b) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

While the *Faragher* and *Ellerth* decisions addressed sexual harassment, the Court's analysis drew upon standards set forth in cases involving harassment on other protected bases. Moreover, the Commission has always taken the position that the

same basic standards apply to all types of prohibited harassment.[1] Thus, the standard of liability set forth in the decisions applies to all forms of unlawful harassment. (See section II, below.)

Harassment remains a pervasive problem in American workplaces. The number of harassment charges filed with the EEOC and state fair employment practices agencies has risen significantly in recent years. For example, the number of sexual harassment charges has increased from 6,883 in fiscal year 1991 to 15,618 in fiscal year 1998. The number of racial harassment charges rose from 4,910 to 9,908 charges in the same time period.

While the anti-discrimination statutes seek to remedy discrimination, their primary purpose is to prevent violations. The Supreme Court, in *Faragher* and *Ellerth*, relied on Commission guidance which has long advised employers to take all necessary steps to prevent harassment.[2] The new affirmative defense gives credit for such preventive efforts by an employer, thereby "implement[ing] clear statutory

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[1] *See, e.g.*, 29 C.F.R. § 1604.11 n. 1 ("The principles involved here continue to apply to race, color, religion or national origin."); EEOC Compliance Manual Section 615.11(a) (BNA 615:0025 ("Title VII law and agency principles will guide the determination of whether an employer is liable for age harassment by its supervisors, employees, or non-employees").

[2] *See* 1980 Guidelines at 29 C.F.R. § 1604.11(f) and Policy Guidance on Current Issues of Sexual Harassment, Section E, 8 FEP Manual 405:6699 (Mar. 19, 1990), *quoted in Faragher*, 118 S. Ct. at 2292.

policy and complement[ing] the Government's Title VII enforcement efforts."[3]

The question of liability arises only after there is a determination that unlawful harassment occurred. Harassment does not violate federal law unless it involves discriminatory treatment on the basis of race, color, sex, religion, national origin, age of 40 or older, disability, or protected activity under the anti-discrimination statutes. Furthermore, the anti-discrimination statutes are not a "general civility code."[4] Thus federal law does not prohibit simple teasing, offhand comments, or isolated incidents that are not "extremely serious."[5] Rather, the conduct must be "so objectively offensive as to alter the 'conditions' of the victim's employment."[6] The conditions of employment are altered only if the harassment culminated in a tangible employment action or was sufficiently severe or pervasive to create a hostile work environment.[7] Existing

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[3] *Faragher*, 118 S. Ct. at 2292.

[4] *Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998, 1002 (1998).

[5] *Faragher*, 118 S.Ct. at 2283. However, when isolated incidents that are not "extremely serious" come to the attention of management, appropriate corrective action should still be taken so that they do not escalate. See Section V(C)(1)(a), below.

[6] *Oncale*, 118 S. Ct. at 1003.

[7] Some previous Commission documents classified harassment as either "quid pro quo" or hostile environment. However, it is now more useful to distinguish between harassment that results in a tangible

Commission guidance on the standards for determining whether challenged conduct rises to the level of unlawful harassment remains in effect.

This document supersedes previous Commission guidance on the issue of vicarious liability for harassment by supervisors.[8] The Commission's long-standing guidance on employer liability for harassment by co-workers remains in effect -- an employer is liable if it knew or should have known of the misconduct, unless it can show that it took immediate and appropriate corrective action.[9] The standard is the same in the case of non-employees, but the employer's control over such individuals' misconduct is considered.[10]

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employment action and harassment that creates a hostile work environment, since that dichotomy determines whether the employer can raise the affirmative defense to vicarious liability. Guidance on the definition of "tangible employment action" appears in section IV(B), below.

[8] The guidance in this document applies to federal sector employers, as well as all other employers covered by the statutes enforced by the Commission.

[9] 29 C.F.R. § 1604.11(d).

[10] The Commission will rescind Subsection 1604.11(c) of the 1980 Guidelines on Sexual Harassment, 29 CFR § 1604.11(c). In addition, the following Commission guidance is no longer in effect: Subsection D of the 1990 Policy Statement on Current Issues in Sexual Harassment("Employer Liability for Harassment by Supervisors"), EEOC Compliance Manual (BNA) N:4050-58 (3/19/90); and EEOC Compliance Manual Section 615.3(c) (BNA) 6:15-0007 - 0008.

II. The Vicarious Liability Rule Applies to Unlawful Harassment on All Covered Bases

The rule in *Ellerth* and *Faragher* regarding vicarious liability applies to harassment by supervisors based on race, color, sex (whether or not of a sexual nature[11]), religion, national origin, protected activity,[12] age, or disability.[13] Thus,

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The remaining portions of the 1980 Guidelines, the 1990 Policy Statement, and Section 615 of the Compliance Manual remain in effect. Other Commission guidance on harassment also remains in effect, including the Enforcement Guidance on *Harris v. Forklift Sys., Inc.*, EEOC Compliance Manual (BNA) N:4071 (3/8/94) and the Policy Guidance on Employer Liability for Sexual Favoritism, EEOC Compliance Manual (BNA) N:5051 (3/19/90).

[11] Harassment that is targeted at an individual because of his or her sex violates Title VII even if it does not involve sexual comments or conduct. Thus, for example, frequent, derogatory remarks about women could constitute unlawful harassment even if the remarks are not sexual in nature. *See* 1990 Policy Guidance on Current Issues of Sexual Harassment, subsection C(4) ("sex-based harassment that is, harassment not involving sexual activity or language - may also give rise to Title VII liability ... if it is 'sufficiently patterned or pervasive' and directed at employees because of their sex").

[12] "Protected activity" means opposition to discrimination or participation in proceedings covered by the anti-discrimination statutes. Harassment based on protected activity can constitute unlawful retaliation. *See* EEOC Compliance Manual Section 8 ("Retaliation") (BNA) 614:001 (May 20, 1998).

employers should establish anti-harassment policies and complaint procedures covering all forms of unlawful harassment.[14]

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[13] For cases applying *Ellerth* and *Faragher* to harassment on different bases, *see Hafford v. Seidner*, 167 F.3d 1074, 1080 (6th Cir. 1999) (religion and race); *Breeding v. Arthur J. Gallagher and Co.*, 164 F.3d 1151, 1158 (8th Cir. 1999) (age); *Allen v. Michigan Department of Corrections*, 165 F.3d 405, 411 (6th Cir. 1999) (race); *Richmond-Hopes v. City of Cleveland*, No. 97-3595, 1998 WL 808222 at *9 (6th Cir. Nov. 16, 1998) (unpublished) (retaliation); *Wright-Simmons v. City of Oklahoma City*, 155 F.3d 1264, 1270 (10th Cir. 1998) (race); *Gotfryd v. Book Covers, Inc.*, No. 97 C 7696, 1999 WL 20925 at *5 (N.D. Ill. Jan. 7, 1999) (national origin). *See also Wallin v. Minnesota Department of Corrections*, 153 F.3d 681, 687 (8th Cir. 1998) (assuming without deciding that ADA hostile environment claims are modeled after Title VII claims), *cert. denied*, 119 S. Ct. 1141 (1999).

[14] The majority's analysis in both *Faragher* and *Ellerth* drew upon the liability standards for harassment on other protected bases. It is therefore clear that the same standards apply. *See Faragher*, 118 S. Ct. at 2283 (in determining appropriate standard of liability for sexual harassment by supervisors, Court "drew upon cases recognizing liability for discriminatory harassment based on race and national origin"); *Ellerth*, 118 S. Ct. at 2268 (Court imported concept of "tangible employment action" in race, age and national origin discrimination cases for resolution of vicarious liability in sexual harassment cases). *See also* cases cited in n.13, above.

III. Who Qualifies as a Supervisor?

A. Harasser in Supervisory Chain of Command

An employer is subject to vicarious liability for unlawful harassment if the harassment was committed by "a supervisor with immediate (or successively higher) authority over the employee."[15] Thus, it is critical to determine whether the person who engaged in unlawful harassment had supervisory authority over the complainant.

The federal employment discrimination statutes do not contain or define the term "supervisor."[16] The statutes make employers liable for the discriminatory acts of their "agents,"[17] and supervisors are agents of their employers. However,

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[15] *Ellerth*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2293.

[16] Numerous statutes contain the word "supervisor," and some contain definitions of the term. *See, e.g.*, 12 U.S.C. § 1813(r) (definition of "State bank supervisor" in legislation regarding Federal Deposit Insurance Corporation); 29 U.S.C. § 152(11) (definition of "supervisor" in National Labor Relations Act); 42 U.S.C.. § 8262(2) (definition of "facility energy supervisor" in Federal Energy Initiative legislation). The definitions vary depending on the purpose and structure of each statute. The definition of the word "supervisor" under other statutes does not control, and is not affected by, the meaning of that term under the employment discrimination statutes.

[17] *See* 42 U.S.C. 2000e(a) (Title VII); 29 U.S.C. 630(b) (ADEA); and 42 U.S.C. §12111(5)(A) (ADA) (all defining "employer" as including any agent of the employer).

agency principles "may not be transferable in all their particulars" to the federal employment discrimination statutes.[18] The determination of whether an individual has sufficient authority to qualify as a "supervisor" for purposes of vicarious liability cannot be resolved by a purely mechanical application of agency law.[19] Rather, the purposes of the anti-discrimination statutes and the reasoning of the Supreme Court decisions on harassment must be considered.

The Supreme Court, in *Faragher* and *Ellerth*, reasoned that vicarious liability for supervisor harassment is appropriate because supervisors are aided in such misconduct by the authority that the employers delegated to them.[20] Therefore, that authority must be of a sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment. The determination as to whether a harasser had such authority is based on

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[18] *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986); *Faragher*, 118 S. Ct. at 2290 n.3; *Ellerth*, 118 S. Ct. at 2266.

[19] *See Faragher*, 118 S. Ct. at 2288 (analysis of vicarious liability "calls not for a mechanical application of indefinite and malleable factors set forth in the Restatement ... but rather an inquiry into the reasons that would support a conclusion that harassing behavior ought to be held within the scope of a supervisor's employment ... ") and at 2290 n.3 (agency concepts must be adapted to the practical objectives of the anti-discrimination statutes).

[20] *Faragher*, 118 S. Ct. at 2290; *Ellerth*, 118 S. Ct. at 2269.

his or her job function rather than job title (e.g., "team leader") and must be based on the specific facts.

An individual qualifies as an employee's "supervisor" if:

a. the individual has authority to undertake or recommend tangible employment decisions affecting the employee; or

b. the individual has authority to direct the employee's daily work activities.

1. Authority to Undertake or Recommend Tangible Employment Actions

An individual qualifies as an employee's "supervisor" if he or she is authorized to undertake tangible employment decisions affecting the employee. "Tangible employment decisions" are decisions that significantly change another employee's employment status. (For a detailed explanation of what constitutes a tangible employment action, see subsection IV(B), below.) Such actions include, but are not limited to, hiring, firing, promoting, demoting, and reassigning the employee. As the Supreme Court stated,"[t]angible employment actions fall within the special province of the supervisor."[21]

An individual whose job responsibilities include the authority to recommend tangible job decisions affecting an employee qualifies as his or her supervisor even if the individual does not have the

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[21] *Ellerth*, 118 S. Ct. at 2269.

final say. As the Supreme Court recognized in *Ellerth*, a tangible employment decision "may be subject to review by higher level supervisors."[22] As long as the individual's recommendation is given substantial weight by the final decisionmaker(s), that individual meets the definition of supervisor.

2. Authority to Direct Employee's Daily Work Activities

An individual who is authorized to direct another employee's day-to-day work activities qualifies as his or her supervisor even if that individual does not have the authority to undertake or recommend tangible job decisions. Such an individual's ability to commit harassment is enhanced by his or her authority to increase the employee's workload or assign undesirable tasks, and hence it is appropriate to consider such a person a "supervisor" when determining whether the employer is vicariously liable.

In *Faragher*, one of the harassers was authorized to hire, supervise, counsel, and discipline lifeguards, while the other harasser was responsible for making the lifeguards' daily work assignments and supervising their work and fitness training.[23] There was no question that the Court viewed them both as

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[22] *Ellerth*, 118 S. Ct. at 2269.

[23] *Faragher*, 118 S. Ct. at 2280. For a more detailed discussion of the harassers' job responsibilities, see *Faragher*, 864 F. Supp. 1552, 1563 (S.D. Fla. 1994).

"supervisors," even though one of them apparently lacked authority regarding tangible job decisions.[24]

An individual who is temporarily authorized to direct another employee's daily work activities qualifies as his or her "supervisor" during that time period. Accordingly, the employer would be subject to vicarious liability if that individual commits unlawful harassment of a subordinate while serving as his or her supervisor.

On the other hand, someone who merely relays other officials' instructions regarding work assignments and reports back to those officials does not have true supervisory authority. Furthermore, someone who directs only a limited number of tasks or assignments would not qualify as a "supervisor." For example, an individual whose delegated authority is confined to coordinating a work project of limited scope is not a "supervisor."

B. Harasser Outside Supervisory Chain of Command

In some circumstances, an employer may be subject to vicarious liability for harassment by a

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[24] *See Grozdanich v. Leisure Hills Health Center*, 25 F. Supp.2d 953, 973 (D. Minn. 1998) ("it is evident that the Supreme Court views the term 'supervisor' as more expansive than as merely including those employees whose opinions are dispositive on hiring, firing, and promotion"; thus, "charge nurse" who had authority to control plaintiff's daily activities and recommend discipline qualified as "supervisor" and therefore rendered employer vicariously liable under Title VII for his harassment of plaintiff, subject to affirmative defense).

supervisor who does not have actual authority over the employee. Such a result is appropriate if the employee reasonably believed that the harasser had such power.[25] The employee might have such a belief because, for example, the chains of command are unclear. Alternatively, the employee might reasonably believe that a harasser with broad delegated powers has the ability to significantly influence employment decisions affecting him or her even if the harasser is outside the employee's chain of command.

If the harasser had no actual supervisory power over the employee, and the employee did not reasonably believe that the harasser had such authority, then the standard of liability for co-worker harassment applies.

* * * * *

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[25] See *Ellerth*, 118 S. Ct. at 2268 ("If, in the unusual case, it is alleged there is a false impression that the actor was a supervisor, when he in fact was not, the victim's mistaken conclusion must be a reasonable one."); *Llampallas v. Mini-Circuit Lab, Inc.*, 163 F.3d 1236, 1247 (11th Cir. 1998) ("Although the employer may argue that the employee had no actual authority to take the employment action against the plaintiff, apparent authority serves just as well to impute liability to the employer for the employee's action.").

OPPOSITION BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
JAN 17 2012
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No. 11-556

In the Supreme Court of the United States

MAETTA VANCE,

Petitioner,

v.

BALL STATE UNIVERSITY

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the unanimous courts below erred in holding that, on the particular facts of this case, the employer was not liable under Title VII for an alleged hostile work environment, where, among other things, the co-employee on which petitioner focuses her challenge in this Court bore none of the hallmarks of a supervisor under any criteria recognized by the courts of appeals or the Equal Employment Opportunity Commission and the undisputed facts showed that the employer promptly investigated each complaint and took disciplinary action where appropriate.

RULE 29.6 STATEMENT

Ball State University is a State supported institution of higher education.

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INTRODUCTION

Petitioner, an African-American employee of Ball State University (BSU) who worked in the dining services division of BSU during the period at issue, sued BSU and certain other employees alleging, *inter alia*, a hostile work environment on account of her race in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.* After carefully reviewing the undisputed facts, the district court granted summary judgment to BSU and the individual defendants. The Seventh Circuit unanimously affirmed in an opinion written by Judge Wood. The court's opinion meticulously discusses petitioner's allegations from the view of the alleged facts "that favors [petitioner]." Pet. App. 17a. Among other things, the court held that petitioner had failed to show that defendant Saundra Davis was a "supervisor." The court explained that Davis lacked the power to "'hire, fire, demote, promote, transfer, or discipline'" petitioner. *Id.* at 12a-13a (citation omitted). Indeed, as the district court observed, in arguing that Davis was a supervisor, petitioner had contended "only that [Davis] is 'part of management because she doesn't clock in.'" *Id.* at 54a. Both courts held that that was insufficient to make Davis a supervisor under Title VII.

Although other circuits and the Equal Opportunity Employment Commission (EEOC) have stated that an employee may be a supervisor for purposes of Title VII if the employee has the authority to "direct the employee's daily work activities" (*id.* at 90a), in applying that test they have focused on whether the employee had the authority to impose additional duties, controlled employees' schedules, was a senior employee at the work place, and actually exercised "dominance"

over other employees. *See supra* at 26-27. The evidence in this case does not show that Davis had or exercised such authority vis-à-vis petitioner or anyone else. And given the absence of any evidence that Davis had such authority, this case does not actually conflict with any other circuit decision holding that an employee was a supervisor under the EEOC standard.

The Court has previously denied a petition for certiorari presenting the same asserted circuit split and the basic question presented here. There is no need, and certainly no pressing need, for this Court to intervene in this case. There is ample evidence that Title VII plaintiffs are able to sustain suits against their employers on hostile work environment claims where the facts actually support such claims. And this case is an unattractive vehicle to address the question presented in any event. Not only do the undisputed facts refute petitioner's contention that Davis was a "supervisor" under any recognized standard (including the EEOC guidelines), but the record overwhelmingly shows—as both the court of appeals and district court emphasized—that BSU promptly investigated each of petitioner's reports of alleged harassment and took appropriate action when warranted. *Id.* at 15a-19a. Accordingly, the courts below properly—and unanimously—concluded "that the undisputed facts demonstrate that there is no basis for employer liability" in this case. *Id.* at 19a.

The petition should be denied.[1]

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[1] The petition seeks review only of the court of appeals' disposition of petitioner's Title VII hostile work environment claim against BSU. Pet. i. The grant of summary judgment thus is final—and not challenged here—as to the individual defendants.

STATEMENT OF THE CASE

The question presented concerns the standard for determining whether an employee is a "supervisor" for purposes of evaluating a Title VII claim that an individual has been subjected to a hostile work environment. Pet. i. That question is relevant here only as to one employee—Saundra Davis. It is undisputed that Bill Kimes and Karen Adkins supervised petitioner, and the courts below analyzed petitioner's claim on the premise that Kimes and Adkins were supervisors. *See* Pet. App. 13a-14a, 55a-59a. Petitioner claims that Davis was "a salaried employee whom [BSU] designated as a 'supervisor,'" Pet. 6, and premises its question presented on these allegations, *id.* at i. Both assertions are inaccurate. The evidence demonstrates that Davis was an hourly employee, not a salaried employee. *See* Melissa Rubrecht Aff. ¶9, *Vance v. Ball State Univ.*, No. 1:06-CV-1452 SEB/JMS (S.D. Ind. filed Nov. 1, 2007) ("*Vance* S.D. Ind."), Dkt. 56-1. Moreover, petitioner's assertion that BSU deemed Davis a supervisor is contradicted by the very page of the appendix (at 54a) that petitioner cites to support this proposition. As that page states, BSU's position always has been "that Ms. Davis is not currently, nor has she ever been, a supervisor." Pet. App. 54a n.17 (citing affidavit). As explained below, that position is consistent with the standard petitioner herself argues should govern.[2]

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[2] In the court of appeals, petitioner referred to a directory of dining staff personnel in suggesting that BSU designated Davis as a supervisor. Brief of Plaintiff-Appellant Maetta Vance at 8, *Vance v. Ball State Univ.*, No. 08-3568 (7th Cir. filed July 8, 2010) ("Pet. C.A. Br.") (citing *Vance* S.D. Ind. Dkt. 62-8). That

A. Statutory Background

Title VII of the Civil Rights Act of 1964 prohibits an employer from "fail[ing] or refus[ing] to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race" or other factors. 42 U.S.C. § 2000e-2(a). Hostile work environment claims are actionable under that prohibition. *See, e.g., Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986). To sustain a hostile work environment claim, a plaintiff must show (1) that harassment based on a proscribed factor such as race was "severe or pervasive;" (2) that a reasonable person in the plaintiff's position would find the environment either hostile or abusive; and (3) that the plaintiff perceived it as such. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78-82 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993).

In *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), this Court considered the circumstances under which an employer could be held vicariously liable under Title VII for the harassment of its employees. The Court held that it is only when a "supervisor with immediate (or successively higher) authority over the employee" has engaged in the complained of conduct, that the "employer [may be] subject to vicarious liability." *Ellerth*, 524 U.S. at 765;

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directory, however, simply lists Davis as a "Catering Specialist." By contrast, those employees who were supervisors are referred to in the directory *as* "supervisors." *Vance* S.D. Ind. Dkt. 62-8; Add. 1a.

Faragher, 524 U.S. at 807. The Court rested its decision in part on agency law. *Ellerth* acknowledged that harassment by one employee of another ordinarily is not within the harasser's scope of employment, and that the employer is therefore not ordinarily vicariously liable for the creation of a hostile work environment on that basis. But liability may arise for actions outside of the scope of employment when the employee "'was aided in accomplishing the tort by the existence of the agency relation.'" 524 U.S. at 758 (citation omitted).

In *Ellerth*, the Court noted that "'[i]t is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome ... conduct on subordinates.'" *Id.* at 763 (citation omitted). The Court added that "a supervisor's power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor always is aided by the agency relation." *Id.* In *Faragher*, the Court similarly observed that a victim "may well be reluctant to accept the risks of blowing the whistle on a superior." 524 U.S. at 803.

Ellerth established two types of situations in which an employer may be held vicariously liable where a supervisor harasses an employee. First, if a supervisor makes a tangible employment decision like the firing or demotion of the alleged victim, the employer is automatically held vicariously liable for its employee's conduct. *Ellerth*, 524 U.S. at 761. Second, if a supervisor's harassment does not culminate in a tangible employment action, the employer may avoid liability by establishing an affirmative defense. *Id.* at 765. To prevail on the affirmative defense, the

employer must show a) that it "exercised reasonable care to prevent and correct promptly any ... harassing behavior," and (b) that the plaintiff employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.*

Employers may also be held liable for co-worker harassment. If a victim suffers harassment at the hands of a coworker with no supervisory authority, a plaintiff may still hold her employer liable for the actions of that coworker if she can demonstrate that the employer was "negligent either in discovering or remedying the harassment." *Perry v. Harris Chernin, Inc.*, 126 F.3d 1010, 1013 (7th Cir. 1997); *cf. Ellerth*, 524 U.S. at 759; *Faragher*, 524 U.S. at 807–08. Akin to the affirmative defense available to an employer for supervisory harassment absent a tangible employment action, once aware of workplace harassment, "'the employer can avoid liability for [a coworker's] harassment if it takes prompt and appropriate corrective action reasonably likely to prevent the harassment from recurring.'" *Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965, 978 (7th Cir. 2004) (quoting *Tutman v. WBBM-TV, Inc./CBS, Inc.*, 209 F.3d 1044, 1048 (7th Cir. 2000)).

Neither *Faragher* nor *Ellerth* directly defined a "supervisor" for Title VII purposes. The EEOC has promulgated guidelines that define a "supervisor" as an individual who (1) "has authority to undertake or recommend tangible employment decisions affecting the employee," such as "hiring, firing, promoting, demoting, and reassigning the employee"; or (2) "has authority to direct the employee's daily work activities." Pet. App. 90a. The guidelines make clear,

however, that "someone who directs only a limited number of tasks or assignments would *not* qualify as a 'supervisor.'" *Id.* at 92a (emphasis added).

B. Factual Background

Respondent BSU is a state-supported institution of higher education in Muncie, Indiana. It employs approximately 6,900 individuals of whom around 850 work in some capacity for Dining Services, which serves thousands of meals every day across the BSU campus. Pet. App. 27a. University Banquet and Catering (UBC) is one division of Dining Services that employs approximately 140 employees. *Id.* During the time frame relevant to this case, Jon Lewis was the Director of Dining Services and headed the entire operation. *Id.* He was assisted by the Assistant Director of Personnel, Training, and Administration, Karen Adkins, who directly reported to Lewis. *Id.* Both Lewis and Adkins supervised Bill Kimes, who served as the General Manager of UBC. *Id.*

Petitioner, an African-American woman, began working for BSU in 1989 as a substitute server in the UBC. *Id.* In 1991, BSU promoted petitioner to a part-time catering assistant position, and in January 2007 petitioner was promoted to a full-time catering assistant. *Id.* at 2a, 7a. Kimes was petitioner's direct supervisor during the relevant periods. *Id.* at 27a.

In 2005, petitioner began filing complaints with BSU alleging that her coworkers' conduct subjected her to discrimination and harassment on the basis of her race. *Id.* at 2a. In November 2005, petitioner submitted a written complaint that described an altercation that she had with Saundra Davis, a coworker in the UBC. *Id.* at 3a-4a. Petitioner alleged

that Davis stood in petitioner's way as she tried to get off an elevator and said, "I'll do it again," which petitioner believed to be a reference to an incident that had occurred four years prior in which Davis allegedly hit petitioner on the back of the head. *Id.* at 3a. Petitioner also alleged that a third employee had told her that another coworker, Connie McVicker, had used the racial epithet "n*gger" (outside of petitioner's presence) and that she had stated that her family had ties to the Ku Klux Klan (KKK). *Id.*

BSU "immediately" launched an investigation into petitioner's complaint. *Id.* at 4a. The investigation revealed conflicting accounts of what had occurred on the elevator between petitioner and Davis. *Id.* at 6a. Before petitioner filed her complaint about the elevator incident, Davis had filed a complaint about the same incident, alleging that petitioner had said to her "Move bitch ... you are an evil f----- bitch." *Id.* at 6a. Kimes discussed the situation with his supervisor, and they decided to counsel both employees about respect in the workplace. *Id.* Neither Davis nor petitioner was disciplined for the incident. *Id.*

Although she never contemporaneously told BSU or complained about the alleged incident, petitioner alleged years later (during a deposition related to the instant litigation) that around this time, in 2005, she heard Davis speaking with another individual and refer to "Sambo" and "Buckwheat." *Id.*; *see also Vance* S.D. Ind. Dkt. 58-3 (Vance Dep. at 50).

In response to petitioner's allegations about McVicker, two supervisors—Kimes and Gloria Courtright—met to discuss the matter. *Id.* at 4a. They also sent petitioner a letter informing her that they were investigating the allegations. *Id.* Employee

Relations was involved in the investigation as well. *Id.* Kimes's investigation corroborated petitioner's complaint regarding what McVicker had said but the witnesses could not recall whether McVicker used the racial epithet generally or to refer to petitioner specifically. *Id.* Nevertheless, the Assistant Director of Employee Relations, Melissa Rubrecht, took prompt action.

Rubrecht sent an email to the Director of Employee Relations, stating: "I know we don't have the specifics on exactly what and when these utterances were ... but we need to make a strong statement that we will NOT tolerate this kind of language or resulting actions in the workplace." *Id.* (BSU generally utilized a four-step process to handle employee discipline, beginning with a verbal warning for the first infraction, followed by a written warning for the second, with escalating consequences for further violations. *Id.*) The Assistant Director concluded, "I think we can justify going beyond our limited prior past history and issue a written warning ... we should also strongly advise [McVicker] verbally when we issue this that it must stop NOW and if the words/behavior are repeated, we will move on to more serious discipline up to an[d] including discharge." *Id.* at 4a-5a.

On November 11, 2005, Kimes gave McVicker a written warning for "conduct inconsistent with proper behavior." *Id.* at 5a. The warning further explained that McVicker was being disciplined for using offensive racial epithets, discussing her family's relationship with the KKK, and also "looking intently" and "staring for prolonged periods at coworkers." *Id.* Courtright also met with McVicker and informed her that BSU would not tolerate racially offensive comments. She

suggested that McVicker avoid petitioner and consider transferring to another department. *Id.* at 5a.

Around the time that Courtright spoke with McVicker, petitioner complained to Courtright that McVicker had called petitioner a "porch monkey." *Id.* Kimes immediately investigated that complaint as well but witnesses did not corroborate Petitioner's allegation, and McVicker denied making the comment. *Id.* Kimes told petitioner that without corroboration he could not discipline McVicker because the incident would be a "she said-she said" situation. *Id.* Kimes did, however, attempt (unsuccessfully) to schedule McVicker and petitioner to work on alternating days. McVicker later transferred to another department. *Id.* at 5a-6a.

On December 22, 2005, petitioner informed Kimes that she felt threatened and intimidated by her coworkers. *Id.* at 6a. Petitioner alleged that Davis and McVicker were giving her a hard time at work by glaring at her, and slamming pots and pans around her. *Id.* The following week, petitioner filed a complaint with the EEOC alleging race-based discrimination. *Id.*

In 2006, petitioner filed additional complaints with BSU alleging additional harassing acts, including being "blocked" on the elevator by Davis who purportedly "stood there with her cart smiling"; being left alone in the kitchen with Davis, who purportedly smiled at her; and being around Davis and McVicker, who purportedly gave her "weird" looks. *Id.* at 6a-7a. She also filed a complaint alleging that Karen Adkins, a supervisor, "mean-mugged" her. *Id.* at 7a. BSU promptly investigated each of these incidents but found no basis to take disciplinary action. *Id.*

On May 10, 2006, petitioner filed another complaint—this time against Kimes—alleging that he forced her to work through breaks. *Id.* BSU again immediately investigated the complaint but again found no factual basis for Petitioner's allegation. *Id.*

In August 2006, Petitioner filed a second complaint with the EEOC alleging retaliation. *Id.*

On October 3, 2006, petitioner filed the instant lawsuit alleging a range of federal and state discrimination claims. *Id.* In particular, petitioner claimed that BSU subjected her to a hostile work environment in violation of Title VII due to her supervisors' direct behavior towards her as well as her supervisors' failure to take prompt remedial action to address the allegedly harassing behavior. *Id.* at 51a-52a.

In 2007, petitioner was promoted by BSU to a fulltime Catering Assistant position. *Id.* at 21a. The promotion included a pay raise, a benefits package worth an additional $9,492, and membership in the BSU bargaining unit, with the rights associated with collective bargaining. *Id.* at 21a, 71a.

While her lawsuit was pending in the district court, in April 2007, petitioner filed another complaint against McVicker alleging that she had said the word "payback" to petitioner. *Id.* at 7a. BSU investigated the incident but McVicker claimed that petitioner had threatened her by saying: "Just the beginning bitch—you better watch your house." *Id.* Because both petitioner and McVicker denied the allegations against them, BSU did not discipline either of them. *Id.*

In August 2007, petitioner alleged that Davis had asked her in a southern accent, "are you scared?" *Id.*

BSU investigated the incident and verbally warned Davis not to engage in such behavior. *Id.*

Later in August 2007, petitioner complained that Kimes had aggressively approached her while repeatedly yelling a question at her. *Id.* at 7a-8a. BSU investigated the incident but the witness identified by petitioner did not corroborate petitioner's account of the alleged incident. *Id.* at 8a. Instead, the witness corroborated Kimes's version of the event and told the investigators that Kimes frequently would ask the same question multiple times to be sure the other person had heard him. *Id.* The witness also stated that Kimes stood in the same place throughout the exchange, that he did not appear to be aggressive, and that he was not speaking in a loud voice. *Id.* at 39a.

In September 2007, Davis made a second complaint against petitioner. Davis alleged that petitioner had splattered gravy on her and slammed pots and pans around her in the kitchen. *Id.* at 8a. Petitioner denied the allegation. BSU investigated and issued a verbal warning to petitioner. *Id.*

C. Decisions Below

Both the district court and the court of appeals carefully considered petitioner's Title VII hostile work environment claim and produced lengthy and detailed opinions concluding that BSU was entitled to summary judgment on that claim based on the undisputed facts.

1. As noted, petitioner filed this action on October 3, 2006. On November 1, 2007, BSU moved for summary judgment on all of Petitioner's claims. *Vance* S.D. Ind. Dkt. 54. On November 30, 2007, Petitioner moved for partial summary judgment. *Vance* S.D. Ind. Dkt. 74. On March 12, 2008, after the summary

judgment motions had been fully briefed, petitioner filed a motion seeking to supplement the record with allegations of events that allegedly occurred long after petitioner had filed her complaint, after discovery had completed, and after all dispositive motions were due. *Id.* at 9a-11a; *Vance* S.D. Ind. Dkt. 124. BSU moved to strike petitioner's additional materials. Pet. App. at 9a; *Vance* S.D. Ind. Dkt. 125.

2. The district court granted in full BSU's motion for summary judgment and denied petitioner's motion for partial summary judgment. Pet. App. at 26a-27a. In a thorough and well-reasoned decision, the district court concluded that petitioner could not sustain her hostile work environment claim against BSU.

As a preliminary matter, the district court granted BSU's motion to strike petitioner's supplemental materials, finding that petitioner's "new allegations of additional harassment are not even attributable to [BSU]" and the few that could possibly be did not "reach the level of significance required to entitle [petitioner] to relief under Title VII." *Id.* at 51a. The court further concluded, however, that even if it considered petitioner's supplemental materials, "they would have no effect on our ultimate determination that she is unable to survive summary judgment on her hostile environment claim." *Id.*

The district court held that petitioner's hostile work environment claim failed as a matter of law on the undisputed facts because there was no basis for employer liability, *id.* at 60a-61a, and the conduct of which petitioner has complained that had a racial character was not sufficiently pervasive or severe to trigger liability under Title VII, *id.* at 53a. The court's decision—which is some 55 pages long as reprinted in

the petition appendix—analyzes petitioner's claim with great care.

The district court first determined that BSU could not be held liable for Davis's actions because under *Faragher*, she was a coworker and not a supervisor. *Id.* at 54a. The court held that Davis did not have the ability to "hire, fire, demote, promote, transfer or discipline" petitioner. *Id.* Under Seventh Circuit precedent, an employee authorized to oversee aspects of another employee's job performance does not establish a Title VII supervisory relationship. *Id.* The district court noted that petitioner "contends only that Ms. Davis is '"part of management because she d[idn't] clock in."' *Id.* (quoting Vance Dep. at 35.17). Indeed, petitioner "concede[d] that she d[id] not actually know whether Ms. Davis was one of her managers," claiming that '"one day she's a supervisor; one day she's not. One day she's to tell people what to do, and one day she's not. It's inconsistent."' *Id.* (quoting Vance Dep. at 84). Thus, the court determined that Davis was petitioner's coworker, not her supervisor.

The district court then assessed petitioner's complaints regarding Kimes and Adkins, who (it is undisputed) did supervise petitioner. *Id.* at 55a. The court held that the alleged harassment suffered by petitioner was not sufficiently severe or pervasive to be actionable under the standard for supervisor liability and that none of the alleged harassment was racial in character or purpose. As noted, the claimed harassment was that Adkins allegedly "mean-mugged" petitioner and Kimes reportedly asked her questions repeatedly. *Id.* at 56a-57a. After reviewing the evidence in detail, the court concluded that "there is no evidence allowing a jury to find that Ms. Adkin's [sic]

and Mr. Kimes's alleged behavior was based on race or sufficiently severe and pervasive to be considered objectively hostile." *Id.* at 58a.

Finally, the district court rejected petitioner's claim of harassment by her co-workers—Davis and McVicker. The court considered each alleged incident and alleged racially-based comment and concluded that the alleged incidents, even when taken together, were not "sufficiently severe or pervasive to have created an objectively hostile working environment." *Id.* at 63a. Moreover, the court added, "[u]nder these facts, there is but one conclusion: [BSU] properly investigated the incidents and, when possible and as necessary, took prompt and appropriate action reasonably calculated to prevent the harassment from occurring." *Id.* at 66a; *see id.* at 59a-66a (discussing evidence underlying allegations).

3. The Seventh Circuit affirmed. The court of appeals noted that a plaintiff bringing a hostile work environment claim is required to prove (1) that her work environment was both objectively and subjectively offensive; (2) that the harassment was based on her race; (3) that the conduct was either severe or pervasive; and (4) that there is a basis for employer liability. *Id.* at 11a. The court explained that the showing required for the fourth factor—whether there is a basis for employer liability—depends on whether the alleged harassment was perpetrated by supervisors or coworkers. *Id.* at 12a. An employer may be held liable in either case. But if only co-workers are responsible for the alleged hostile work environment, "the plaintiff must show that the employer has 'been negligent either in discovering or remedying the harassment.'" *Id.* (citation omitted).

The court of appeals explained that, "[u]nder Title VII, '[a] supervisor is someone with power to *directly* affect the terms and conditions of the plaintiffs employment,'" and that such "authority 'primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee.'" *Id.* (alteration in original) (citation omitted). Applying that standard, the court concluded that petitioner "has not revealed a factual dispute regarding Davis's status by asserting that Davis had the authority to tell her what to do or that she did not clock-in like other hourly employees." *Id.* at 13a. As a result, the court held, "we must evaluate her claim against Davis under the framework for coworker conduct." *Id.*

Adkins and Kimes indisputably were petitioner's supervisors, but the court held that their alleged conduct was not sufficient to trigger liability. Petitioner's sole complaint against Adkins was that she stared at and "mean-mugged" Petitioner. The court found that "[m]aking an ugly face at someone and staring ... fall short of the kind of conduct that might support a hostile work environment claim." *Id.*

The court of appeals gave the allegations concerning Kimes "a close[] look," but concluded that Kimes's alleged conduct did not have a racial character or purpose. *Id.* at 13a-14a. The court explained that "there is some indication in the record that Kimes was generally difficult to work with," but it concluded that—even viewing the evidence "favorably to [petitioner]"—petitioner's "allegations do not establish that Kimes's unkind or aggressive conduct was motivated by [petitioner's] race." *Id.* at 13a. Indeed, the court explained that petitioner has "not put forth *any* facts to establish that *any* of Kimes's conduct was

motivated by, or *had anything* to do with, race." *Id.* at 14a (emphasis added). The court also noted that petitioner conceded that "she never heard Kimes say anything suggesting ill will towards her because of her race." *Id.*

Finally, the court of appeals also carefully assessed petitioner's alleged treatment by coworkers Davis and McVicker and—like the district court—determined that BSU "promptly" and thoroughly investigated each of the alleged incidents and comments and took "disciplinary action when appropriate." *Id.* at 15a.[3] The court explained that in response to petitioner's complaint that McVicker used the racial epithet "n*gger," BSU immediately began an investigation, involved all the appropriate supervisory personnel, and issued a written reprimand to McVicker. *Id.* at 16a. The court emphasized the fact that under the BSU policy, McVicker technically should have received only an oral warning but BSU concluded that a more serious measure was in order. *Id.* The court also emphasized the fact that the written warning conveyed to McVicker said that her racially offensive language would not be tolerated, and that two supervisors met with McVicker separately to discuss her conduct. *Id.* The court also noted that BSU also kept in contact with petitioner during the entire investigation. *Id.*

The court of appeals further explained that, in response to petitioner's complaints that McVicker reportedly called her a "porch monkey" and said "payback," BSU again investigated. *Id.* Although the

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[3] The court assumed, *arguendo*, that petitioner's allegations against her coworkers satisfied the first three elements of a Title VII hostile work environment claim. Pet. App. 15a.

investigation revealed competing versions of events, the court approvingly noted BSU "did what it could and did not stop by accepting a simple denial." *Id.* at 17a. The court noted that the record "d[id] not reflect a situation in which all ties went to the discriminator" and explained that BSU "calibrated its responses depending on the situation." *Id.*

Regarding Davis's alleged conduct, the court of appeals focused on the alleged "elevator incident in 2005" and the "'are you scared' comment in 2007." *Id.* Regarding the "elevator incident," the court noted that Davis had filed a complaint first alleging that petitioner had said "[m]ove, bitch ... you are an evil f—— bitch." *Id.* at 18a. Petitioner's complaint alleged that Davis had said "I'll do it again." *Id.* The court noted that BSU investigated this incident but that both individuals denied saying anything offensive to each other. The court determined that BSU's response in counseling both employees was entirely reasonable, observing that Title VII "'is not ... a general civility code and we will not find liability based on the sporadic use of abusive language.'" *Id.* (alteration in original) (internal quotation marks and citations omitted). Regarding the "are you scared" comment, the court noted that BSU once again investigated petitioner's complaint. And despite Davis's denial of the allegations, BSU formally warned her to refrain from such behavior. *Id.* The court found that this "response was reasonable." *Id.* at 18a-19a.

The court of appeals noted Davis's alleged use of the terms "Buckwheat" and "Sambo." *Id.* at 17a. But the court explained that petitioner herself conceded that she never informed BSU about Davis's alleged use of those terms, and that under Title VII "an employer's

liability for coworker harassment is not triggered unless the employee notifies the employer about an instance of racial harassment." *Id.* at 17a-18a.

The court of appeals summed up its analysis by noting that, although the catering department may have been "an unpleasant place" for petitioner, "the record reflects that [BSU] promptly investigated each complaint that she filed, calibrating its response to the results of the investigation and the severity of the alleged conduct." *Id.* at 19a. Such action, the court explained, is the "'hallmark of reasonable corrective action.'" *Id.* (citation omitted). Moreover, the court stressed that "[t]his is not a case where the employer began to ignore an employee's complaints as time went on." *Id.* To the contrary, the court found, "[BSU] investigated [petitioner's] complaint against Davis in 2007 with the same vigor as it did her complaint in 2005." *Id.* These facts, the court held, "demonstrate that there is no basis for employer liability." *Id.*[4]

Petitioner did not seek rehearing *en banc*.

REASONS FOR DENYING THE WRIT

The petition should be denied. Although circuits have articulated different standards for determining when an employee is a "supervisor" for purposes of Title VII, no circuit has concluded that an employee was a supervisor under anything resembling the circumstances here. There is, accordingly, no genuine conflict of authority and, at a minimum, there is no

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[4] The court of appeals also concluded that the district court did not abuse its discretion in excluding petitioner's supplemental evidence. Pet. App. 10a-11a. Petitioner has not sought review of that evidentiary ruling in this Court.

outcome-determinative conflict. Petitioner cannot demonstrate that the employee at issue—Saundra Davis—was a supervisor under *any* standard recognized by the courts of appeals or the EEOC.

Nor is there any compelling need for this Court's review. Eight years ago, the Court denied a petition raising the same asserted conflict on when an employee is a supervisor for purposes of assessing an employer's liability under Title VII. The landscape in the circuits has not materially changed since then. There is no evidence that Title VII plaintiffs have experienced any difficulty maintaining hostile work environment claims where actual discrimination occurred—even in the circuits that apply the Seventh Circuit "supervisor" test. And the problem with petitioner's action here is not that courts declined to view Davis as a supervisor; it is that petitioner failed to present evidence that she suffered harassment of a racial character that was severe or pervasive, and that the evidence that *was* presented shows that BSU promptly investigated and took swift disciplinary action where appropriate.

Both the court of appeals and the district court carefully considered petitioner's Title VII claim, and her serial allegations of discriminatory conduct, and concluded that BSU could not be held liable under petitioner's hostile work environment theory. Judge Wood's opinion for the Seventh Circuit in this case is a model for careful judging in a discrimination case. If the Court believes it may be appropriate to devote its scarce resources to deciding the question presented, it should wait for a case in which the court of appeals decision actually conflicts with the decision of another circuit and in which there is reason to believe that the

question presented would actually make a difference to the outcome. Neither element is presented here.

I. THE ASSERTED CIRCUIT CONFLICT DOES NOT NECESSITATE REVIEW

Like the First and Eighth Circuits, the Seventh Circuit has declined to hold "that the authority to direct an employee's daily activities establishes supervisory status under Title VII." Pet. App. 13a; *see Noviello v. City of Boston*, 398 F.3d 76, 96 n.5 (1st Cir. 2005); *Joens v. John Morrell & Co.*, 354 F.3d 938, 940 (8th Cir. 2004). These circuits instead look to whether the employee is "'someone with power to *directly* affect the terms and conditions of the plaintiff's employment,'" such as the authority to "'hire, fire, demote, promote, transfer, or discipline'" the employee. Pet. App. 12a (citation omitted). Petitioner argues that this Court's intervention is necessary—here and now—to resolve that asserted circuit conflict. That contention cannot withstand scrutiny.[5]

There certainly is no urgent need for this Court's intervention. Despite petitioner's assertions about the need for this Court's review, there is ample evidence that Title VII plaintiffs are able to maintain—and prevail upon—legitimate lawsuits against employers for hostile work environments created by coworkers. Numerous cases demonstrate that plaintiffs are able to prevail in Title VII suits seeking to hold employers vicariously liable for harassing behavior by coworkers.

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[5] In describing the asserted conflict, petitioner cites a number of unpublished decisions. *See* Pet. 13-20. Those non-precedential decisions of course do not contribute to any actual conflict.

Many of these cases are from the circuits that have adopted the Seventh Circuit's supervisor test.[6]

In addition, this Court has previously denied a petition for certiorari presenting the same issue and alleged circuit split identified here. *See Mack v. Otis Elevator Co.*, 326 F.3d 116 (2d Cir.), *cert. denied*, 540 U.S. 1016 (2003). Respondent is not aware of any other petitions for certiorari presenting this issue to the Court since *Mack*. At the least, the absence of such petitions suggests that the issue does not have the practical significance that petitioner hypothesizes. It

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[6] *See, e.g., Bailey v. USF Holland, Inc.*, 526 F.3d 880, 887-88 (6th Cir. 2008) (affirming a judgment in favor of two African American employees who were the target of their coworkers' racial hostilities); *Erickson v. Wisconsin Dep't of Corr.*, 469 F.3d 600, 609 (7th Cir. 2006) (concluding that a reasonable jury could have found that the employer failed to take reasonable precautions to prevent sexual harassment by a coworker from occurring); *Southerland v. Sycamore Cmty. Sch. Dist. Bd. of Educ.*, 125 F. App'x 14, 16 (6th Cir. 2004) (rejecting the employer's challenge to a unfavorable hostile work environment verdict based on coworker harassment); *Henderson v. Simmons Foods, Inc.*, 217 F.3d 612, 617 (8th Cir. 2000) (upholding a jury verdict awarding damages for coworker sexual harassment that created a hostile work environment); *Moore v. Kuka Welding Sys. + Robot Corp.*, 171 F.3d 1073, 1079 (6th Cir. 1999) (upholding, inter alia, a jury verdict for plaintiff based on the existence of a racially hostile work environment created by coworkers); *Hathaway v. Runyon*, 132 F.3d 1214, 1225 (8th Cir. 1997) (reversing the district court's grant of employer's motion for judgment as a matter of law in coworker harassment suit and reinstating a jury verdict in favor of the plaintiff victim); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1011 (8th Cir. 1988) (affirming a judgment in favor of a trio of women who were sexually harassed by coworkers). Plaintiffs likewise frequently prevail on such claims in the district court and are able to defeat summary judgment motions by employers seeking to dismiss such actions.

has been more than 13 years since this Court decided *Faragher* and *Ellerth*. And particularly given the volume of employment discrimination cases filed each year (*see* Pet. 28), the absence of any direct evidence that the asserted conflict necessitates this Court's review is telling. As petitioner notes (*id.*), the *Mack* petition asserted that the issue was "'important and recurring.'" But that contention is belied by the fact that the issue apparently has not been presented to the Court—by Title VII plaintiffs or employers—in the eight years since the Court denied certiorari in *Mack*.

In any event, although circuits have articulated different tests for determining when an employee is a supervisor, no circuit has ever held that an employee is a supervisor in the circumstances at issue here. For that reason, there is no actual conflict between the Seventh Circuit decision in this case and the decision of any other court of appeals. And for similar reasons, the resolution of the asserted circuit conflict would not be outcome determinative here, because (as explained next) Davis would not qualify as a supervisor even under the legal standard that petitioner advances. Accordingly, the petition should be denied.

II. THE SEVENTH CIRCUIT'S CONCLUSION THAT DAVIS WAS NOT A SUPERVISOR DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT

No circuit has ever held that an employee qualified as a supervisor under factual circumstances resembling those with respect to Davis here. And that is because Davis does not qualify as a supervisor under *any* test adopted by a court of appeals or the EEOC.

The approach followed by the circuits that have rejected the Seventh Circuit position is embodied by the EEOC guidelines. Under those guidelines, a supervisor's authority "must be of a sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment." Pet. App. 89a. An individual qualifies as a supervisor—according to the EEOC—if the individual has "authority to undertake or recommend tangible employment decisions affecting the employee" or "the individual has authority to direct the employee's daily work activities." *Id.* at 90a. But "someone who directs only a limited number of tasks or assignments" is not a supervisor for Title VII purposes. *Id.* at 92a.[7]; *see Mack*, 326 F.3d at 126-27 (following EEOC guidelines); *Whitten v. Fred's, Inc.*, 601 F.3d 231, 246 (4th Cir. 2010) (citing *Mack*, 326 F.3d at 125); *cf. McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1119 n.13 (9th Cir. 2004) (observing that court should look to whether employee

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[7] In adopting that standard, the EEOC has asserted that one of the lifeguards in *Faragher* (Silverman) "was responsible for making the lifeguards' daily work assignments and supervising their work and fitness training." Pet. App. 91a. In fact, "Silverman had supervisory responsibility over the lifeguards' daily duties, including designation of the lifeguards' work assignments, staffing of shifts and supervision of their physical fitness routines"; Silverman "made supervisory and disciplinary decisions and had input on the evaluations as well"; and other lifeguards, including Faragher, received a memo explaining that "Lieutenants [Silverman's position] were their immediate supervisors in the chain of command." Brief for Petitioner at 9-10, *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (No. 97-282), 1997 WL 793076. Silverman's responsibilities, authority, and position therefore differ in several fundamental respects from those possessed by Davis here. *See supra* at 25-27.

"has the authority to demand obedience from an employee").[8]

The facts in this case do not come close to establishing that Davis was a supervisor even under the EEOC guidelines. As the district court observed, petitioner's "only" contention was that Davis was "'part of management because she doesn't clock in.'" Pet. App. 54a (quoting Vance Dep. at 35.17). Beyond that sole assertion, petitioner conceded that she did not actually know whether Davis was one of her managers because "'one day she's a supervisor; one day she's not. One day she's to tell people what to do, and one day she's not. It's inconsistent.'" *Id.* (quoting Vance Dep. at 84). And it is undisputed that after petitioner's first complaint against Davis after the elevator incident, Kimes prohibited Davis from directing petitioner at all. *Vance* S.D. Ind. Dkt. 56-6 at 93. There is no evidence that Davis had any authority to make regular, daily work assignments. In fact, daily work assignments were made by the Banquet Chef, Shannon Fultz, or Kimes—not Davis. *Vance* S.D. Ind. Dkt. 87-3.[9]

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[8] *Whitten* is not a Title VII case. The claims at issue in that case were brought under state law. 601 F.3d at 236.

[9] Petitioner has alleged that "Davis *periodically* had authority to direct the work of other employees." Pet. App. 54a (emphasis added). In the court of appeals, she cited the deposition testimony of Kimes in making a similar contention. Pet. C.A. Br. 7 (citing Kimes Dep. at 93 (*Vance* S.D. Ind. Dkt. 56-6)). Kimes, however, testified that Davis was not a supervisor and, among other things, lacked the "authority to discipline" or "direct the day-to-day operations" or "events going out." Kimes Dep. at 93-94 (*Vance* S.D. Ind. Dkt. 56-6). In any event, even the EEOC guidelines recognize that such intermittent authority (even when it actually exists) is not sufficient. *See* Pet. App. 92a ("someone who directs only a limited number of tasks or assignments would not qualify as

These facts stand in sharp contrast to the facts from cases in which the lower courts have applied the EEOC test (or equivalent test) to determine whether an employee possessed supervisory authority despite the absence of authority to take tangible employment actions. For example, in *Mack*, the Court applied the EEOC's test and concluded that the harassing employee was a "supervisor for purposes of Title VII analysis." 326 F.3d at 125, 127. The court noted that the harassing employee not only "direct[ed] the particulars of each of [the plaintiff's] work days, including her work assignments," but "he was the senior employee on the work site." *Id.* at 125. Because of that position, "[h]e therefore possessed a special dominance over other on-site employees, including [the plaintiff], arising out of their remoteness from others with authority to exercise power on behalf of" other supervisors. *Id.* The court took pains to note that "[t]here was no one superior" to the harassing employee at the work site "whose continuing presence might have acted as a check on [the harassing

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a 'supervisor'"). And even if Davis could be deemed a supervisor under the EEOC test (which she cannot based on this record), the EEOC Guidelines require that that the allegedly harassing activity occur while Davis was acting in a supervisory capacity. Petitioner has not shown that Davis was acting in a supervisory capacity when she made the two comments that arguably had a racial character. Davis's references to "Buckwheat" and "Sambo" (about which petitioner did not complain to BSU) were not made during any period of alleged intermittent supervision. Rather, petitioner merely overheard the references when she walked past Davis conversing with a third party. Similarly, Davis allegedly made the "[a]re you scared" comment in August 2007—after petitioner was promoted so that Davis no longer had even the arguable intermittent authority alleged.

employee's] coercive misbehavior toward" the plaintiff. *Id.*

Likewise, in *Whitten*, the evidence "establishe[d] that Green [the employee whose status was in question] directed [plaintiff]'s activities, giving her a list of tasks he expected her to accomplish; that Green controlled [plaintiff]'s schedule; and that Green possessed and actually exercised the authority to discipline [plaintiff] by giving her undesirable assignments and work schedules." 601 F.3d at 246; *see id.* ("Unlike a mere co-worker, Green could change [plaintiff]'s schedule and impose unpleasant duties on a whim," and "he in fact did so, making her stay late to clean the store and directing her to work on a Sunday that was supposed to be her day off").[10]

By comparison to the asserted supervisors in *Mack* and *Whitten*, Davis did not direct petitioner's daily work activities, did not provide her with work assignments, did not control her schedule, lacked the authority to discipline her, and was not the senior employee at the work place. Indeed, the evidence of supervisor status presented by petitioner falls well below that presented in *Mikels v. City of Durham*, 183 F.3d 323, 334 (4th Cir. 1999), which the Fourth Circuit held was *insufficient* to make the employee at issue (Acker) a supervisor. According to the Fourth Circuit, "any authority possessed by Acker over [plaintiff] was

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[10] Similarly, in *Smith v. City of Oklahoma City*, 64 F. App'x 122 (10th Cir.), *cert. denied*, 540 U.S. 948 (2003), an unpublished decision, the Tenth Circuit determined that a jury could find that a police sergeant trainer in a K-9 unit was the victim's supervisor because he directed her daily tasks, assigned the victim her dog, provided her with daily one-on-one training, and was the ultimate arbiter of whether she and her dog were "qualified." *Id.* at 126-27.

at best minimal." *Id.* "At most," Acker had "the occasional authority to direct [plaintiff's] operational conduct while on duty." *Id.* Yet, as discussed, there is no evidence in this case that Davis possessed even that "minimal" authority over petitioner.

The record in this case also establishes that petitioner did not hesitate to confront Davis and tell her "'where to go.'" *Id.* (quoting *Faragher*, 524 U.S. at 803). According to the Fourth Circuit in *Mikels*, the fact that the alleged victim does not exhibit "any sense of special vulnerability or defenselessness deriving from whatever [alleged] authority" the coworker possessed, is the "clincher." *Id.* Indeed, petitioner's own conduct towards Davis caused Davis to file complaints *against her*. In the first complaint, Davis reported that petitioner called Davis a "f—— bitch" during the "elevator incident." Pet. App. 6a. In the second complaint, Davis reported that petitioner had splattered gravy on her and slammed pots and pans around her. *Id.* at 8a. Petitioner's demonstrated willingness to stand up to Davis underscores that Davis was not a supervisor—even under the alternative test that petitioner relies on.

In short, the Seventh Circuit's conclusion that Davis was not a supervisor on the facts here does not actually conflict with the decision of any other circuit.[11]

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[11] In both of the Ninth Circuit cases cited by petitioner (at 17), the court of appeals simply concluded that the test for whether an employee is a supervisor depends on whether the employee "has the authority to demand obedience from an employee." *See McGinest*, 360 F.3d at 1119 n.13; *Dawson v. Entek Int'l*, 630 F.3d 928, 940 (9th Cir. 2011). In neither case did the court apply that standard in finding that an employee *was* a supervisor; rather, in

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In sum, despite the alleged circuit conflict, this case is an unattractive vehicle for certiorari. Because Davis would not qualify as a supervisor under any circuit's test (or the EEOC's), the Seventh Circuit's decision in this case does not conflict with the decision of any other circuit (or the EEOC guidance). Moreover, the courts below carefully considered and correctly rejected her Title VII claim. As the courts below recognized, BSU took every step and made every reasonable effort to investigate and address all of petitioner's numerous complaints. BSU "promptly investigated each complaint that [petitioner] filed, calibrating its response to the results of the investigation and the severity of the alleged conduct." Pet. App. 19a. And BSU "investigated [petitioner's] complaint against Davis in 2007 with the same vigor as it did her complaint in 2005." *Id.* Further, it is undisputed that BSU did not take any negative tangible employment action against petitioner. To the contrary, petitioner was *promoted* in 2007—and given a pay raise, a more lucrative benefits package, and collective bargaining rights. *Id.* at 21a.[12] BSU's actions were those of a

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both cases the court simply remanded for further consideration on "a more extensive factual record." *Id.*

[12] Petitioner asserts that review is warranted because "the affirmative defense under *Ellerth* and *Faragher* will be unavailable to" BSU if Davis is determined to be a supervisor. Pet. 29. That is incorrect. Even if Davis were determined to be a supervisor, BSU would still be able to establish an affirmative defense because petitioner suffered no negative tangible employment action as a result of the alleged harassment. To the contrary, she was eventually promoted. *See Ellerth*, 524 U.S. at 765.

conscientious and vigilant employer—precisely the response that this Court's precedents call for.

As all four Judges concluded after carefully detailing and considering each of the allegedly actionable incidents and comments raised by petitioner, "the undisputed facts demonstrate that there is no basis for employer liability." *Id.* at 19a. Nor is there any basis for further review in this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JANUARY 17, 2012

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Meet Our Staff

DINING

Administrative Staff

Director of Campus Dining Services
Jon Lewis

Assistant Director of Personnel, Training and Administration
Karen Adkins

Assistant Director of Operations
Elizabeth Poore

Facilities Manager and Microcomputer/Network Manager
John Hostetler

Manager of Training
Deborah Hutton

Coordinator of Communication, Publications, Research, And Student Retention for Housing and Residence Life And
Cynthia Miller

Manager of Menu Development and Test Kitchen
Lucas Miller

Plaintiff's
Exhibit
22
10-11-07

[URL illegible] 10/10/2007

Manager of Food Service Purchasing
Avanelle Reed

Business Administrator
Kelley Rose

Cbord Computer Systems Coordinator
Amy Wagner

Meal and Access Card Systems Coordinator
Teresa Banter

Receptionist/Processing Clerk
Susie Burt

Financial Data Coordinator
Robert Cope

Rhds Office Supervisor
Kyle Green

Assistant to Purchasing Manager
Marguerite Mader

Assistant Facilities Manager
William Reed

Test Kitchen Specialist
Jeraldine Richardson

Office Assistant
Christina Skaggs

Stock Clerk
Dannie Campbell

Food Stores Clerk
David Craig

Food Stores Clerk
Danny Gunter

Food Stores Clerk
Gerald Mason

The Atrium Management

General Manager
Rodney Brooks

University Food Court Assistant Manager
Linda Garcia

Sous Chef
Jason Reynolds

University Food Court Supervisor
Barbara Dorton

University Food Court Supervisor
Andrea Stuffel

University Food Court Supervisor
Jill Thomas

Bookkeeper/Auditor
Josephine Turner

Cardinal Crossing Management

General Manager of University Banquet and Catering
William Kimes

Cardinal Crossing Assistant Manager
Tina Swift

Food Service Supervisor
Frances Percy

Elliott Dining Management

Unit Manager
Eileen Jones

Food Service Supervisor
Robin Hatton

Food Service Supervisor
Timothy Skinner

Bookkeeper
Debra Worster

LaFollette Square Management

Unit Manager
Timothy Radtke

Assistant Manager
Michael Chandler

Sous Chef
Aaron Gnap

Food Service Supervisor
Edward Landreth

Food Service Supervisor
Anna Arison

Food Service Supervisor
Angela Canarecci

Food Service Supervisor/Management Trainee
Megan Luyet

Bookkeeper
Teena Kennedy

Noyer Centre Management

Unit Manager
Polly Ems

Assistant Manager
Amy Hardesty

Sous Chef
Charles Kain

Sous Chef
Allen White

Food Service Supervisor/Management Trainee
Amanda Ahlschwede

Food Service Supervisor
Carol Pettiford

Food Service Supervisor
Jill Schneider

Food Service Supervisor
Kanda Winfield

Bookkeeper
Debra Worster

University Banquet and Catering

General Manager of University Banquet and Catering
William Kimes

Banquet and Catering Chef/Supervisor
Shannon Fultz

Catering Specialist
Saundra Davis

University Banquet and Catering Sales and Service Supervisor
Lisa Fordyce

Banquet and Catering Sales and Service Supervisor
Ana Lisa Padron

Banquet and Catering Secretary
Teresa Rector

Catering Account Representative
Pamela Poti

Woodworth Commons

Woodworth Unit Manager
Amy Grasso

Assistant Manager
Kelly Gnap

Sous Chef
Jonathan Crain

Sous Chef
Cameron Griggs

Food Service Supervisor
Rexanne Arison

Bookkeeper
Phyllis Kennett

REPLY BRIEF

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AND
BRIEFS

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No.11-556

In the Supreme Court of the United States

MAETTA VANCE,

Petitioner,

v.

BALL STATE UNIVERSITY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the
Seventh Circuit

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REPLY BRIEF FOR PETITIONER

The decision below affirmed summary judgment on a single ground, Title VII "employer liability," App. 11a, reasoning that evidence that Saundra Davis was a manager and directed Maetta Vance's work did not create a material dispute, because of binding circuit precedent restricting *Faragher/Ellerth* vicarious liability to harassment by those supervisors with authority to take ultimate employment actions against their victims. *Id.* 12a. That rule of law, the decision expressly acknowledged, conflicts with the EEOC's longstanding, closely-reasoned interpretation and decisions of numerous "other circuits [which] hold[] that the authority to direct an employee's daily activities establishes supervisory status under Title VII," *Ibid.*

As the petition explained (Pet. 27-29), this conflict is practically important, both because of the frequency with which this issue arises in the lower courts and because the starkly divergent rules produce dramatically different results. Intervention by this Court is particularly warranted because the split is growing and because the Seventh Circuit has refused to reconsider its rule in the face not only of conflicting authority but also of credible arguments it is irreconcilable with the decisions of this Court it is meant to implement. *Id.* at 21.

The Brief in Opposition is as notable for what it does not say as for what it does. Despite its length, it omits any argument that the Seventh Circuit's restrictive rule is correct or even permissible under *Faragher/Ellerth*. Equally absent is any serious effort to deny the existence of the sharp, wide, and entrenched circuit conflict on the question presented.

Instead, respondent confines its Opposition to two principal points: (1) a series of arguments that seek to establish that the conflict is not important enough to warrant the Court's intervention and (2) a plea that the Court "wait" (Opp. 20) for a future case in which the same Seventh Circuit rule is applied. Petitioner's case, respondent suggests, is not an "[]attractive vehicle," *id.* at 29, because of "problem[s]," *id.* at 20, unrelated to the employer responsibility issue and because, it announces, "the facts in this case" would not "establish[] that Davis was a supervisor * * * under the EEOC Guidelines," *Id.* at 25.

Neither of these has merit. The issue the petition raises has divided nine courts of appeals and been addressed in hundreds of (likewise conflicting) district court decisions, including many where the choice of "supervisor" definition was decisive, as it was here.

As for the supposed "vehicle" concerns, none of the issues to which respondent seeks to direct attention would prevent or even complicate the Court's resolution of the question presented. And none was passed upon by the Seventh Circuit, which assumed petitioner had established the other elements of her Title VII hostile environment claim and rested affirmance of summary judgment squarely and unambiguously on its controversial "supervisor" rule.

Nor should respondent's emphatic declarations that "Davis would not qualify as a supervisor" under the competing (correct) legal standard, Opp. 23, distract the Court. These are based on nothing but respondent's say-so: neither court below considered the "facts in this case" "under the EEOC standard,"

id. at 25, let alone determined or even suggested that respondent could carry its summary judgment burden on that issue. Indeed, both opinions are fairly read as accepting (at least assuming) that, absent the Seventh Circuit's restrictive definition, the evidence raised a triable claim that Davis was a supervisor, *i.e.*, "authorized to direct [petitioner's] day-to-day work activities," App. 91a (EEOC standard), which she was. Ball State's attempts to persuade the Court otherwise entail simply omitting the record evidence supporting petitioner's contention, not least the official description of Davis's job responsibilities, which begins with "supervis[e]," and proceeds to "direct[ing]" and "oversee[ing]." Pet. Summ. J. Br. Exh. 2 (No. 1:06-cv-1452-SEB-JMS).

I. THE CONFLICT OVER THE QUESTION PRESENTED IS GENUINE, WIDESPREAD, ENTRENCHED, AND IMPORTANT

1. The Opposition takes care to insert adjectives like "asserted" and "alleged" each time the word "conflict" appears. *E.g.*, Opp. at 2, 20-23, 29. But that the courts of appeals have settled on starkly different rules for determining when harassment of a subordinate triggers vicarious liability under *Faragher/Ellerth* is a fact, not an allegation. The existence of this split was expressly recognized below, as it has been by commentators and a raft of other courts, many of which have rejected the Seventh Circuit's restriction (often after concluding that it is not merely an implausible reading of *Faragher* and *Ellerth*, but an impermissible one).

Nor, despite respondent's dust-kicking, see *infra*, is there any denying that the Seventh Circuit's decision in this case rested squarely on the

controversial rule. The opinion acknowledged Vance's contention that Davis was a manager, vested with authority to "tell her what to do," App. at 13a, but then explained that, without the evidence of power over hiring and firing the Seventh Circuit rule requires, *id.* at 12a-13a, she had not raised a triable issue of "supervisory status under Title VII." *Id.* at 13a (noting Judge Rovner's concurrence in *Rhodes* v. *Ill. Dep't of Transp.*, 359 F.3d 498, 509 (7th Cir. 2004), advocating "a broader standard of supervisor liability based on EEOC guidelines").

2. Unable to credibly deny the *existence* of the conflict, respondent ventures a series of odd arguments purporting to show its unimportance.

a. Ball State proffers the denial "[e]ight years ago" of a "petition for certiorari [in *Otis Elev. Co.* v. *Mack*, 540 U.S. 1016 (2003)] presenting the same * * * basic question presented here," Opp. 2, as proof of the issue's unimportance. But even apart from the rule against "according" such dispositions "precedential value," 16B Charles A. Wright, et al, Fed. Prac. & Proc. Juris. § 4004.1 (2d ed. 1996), the assertion that "the landscape in the circuits" has not "materially changed" since 2003, Opp. at 20, is mystifying. When the *Mack* petition was filed, the only conflict the employer-petitioner could allege was between the Second Circuit decision in that case and the Seventh Circuit's in *Parkins* v. *Civil Constructors of Illinois, Inc.*, 163 F.3d 1027 (7th Cir. 1998) – a case briefed before *Faragher* and *Ellerth* were handed down and decided before the EEOC Guidance that persuaded the *Mack* court had been issued. Indeed, opposing certiorari, the respondent in *Mack* highlighted language in the *Parkins* opinion seeming to suggest the Seventh Circuit approach

would be less stringent than the petitioner maintained. See Br. in Opp., No. 03-229 at 3.

The "landscape" now could hardly be more different. For its part, the Seventh Circuit has made clear that its rule is as rigid and restrictive as the *Mack* petitioner argued. See, *e.g.*, *Rhodes*, 359 F.3d at 506 (only harassment by those with "authority to hire, fire, promote, demote, discipline or transfer" gives rise to vicarious liability); *id.* at 509-510 (Rovner, J., concurring) (criticizing "circuit's method of identifying supervisors," and urging that court "re-examine [it]"); *id.* at 510 (Cudahy, J., concurring) (agreeing that rule should be "reconsider[ed] and "broaden[ed]").

Moreover, courts across the Nation have now chosen sides. See Pet. 13-20. What was (at most) a 1-1 circuit split in 2003 is now a 5-4 division (3-3 among those which have addressed the question in published opinions), with district and state courts registering similar disagreement. While respondent quibbles over exactly which decisions "contribute[]to [the] * * * conflict," Opp. at 21 n.5, it does not – and could not – claim that there is any realistic prospect of nationwide uniformity without this Court's intervention.

b. Respondent's attempt to find meaning in the "the absence of * * * petitions" presenting the question since *Mack* (Opp. 22), *i.e.*, as "bel[ying]," *id.* at 23, the petition's description of this issue as recurring and important, is equally strange. The claim's factual premise is mistaken: a petition was filed in *Cheshewalla* v. *Rand & Son Constr. Co.*, 415 F.3d 847 (8th Cir. 2005). See Pet. for Cert., No. 05-494 at i; 546 U.S. 1091 (2006) (denying cert.). And the inference respondent invites from litigants'

decisions not to seek certiorari is implausible: several of the decisions giving rise to the split resulted in remands, see Eugene Gressman, et al., Supreme Court Practice § 2.3 (9th ed. 2009) at 81-82 (explaining Court's reluctance to review nonfinal judgments), and it is not uncommon for employers to settle, rather than litigate, cases, especially ones involving unflattering evidence of "severe or pervasive" sex- or race-based workplace harassment (and limited damage exposure, see 42 U.S.C. § 1981a(b)(3)). For modestly-paid workers with individual discrimination claims – those not represented by pro bono counsel – the practicalities of petitioning can be more daunting. The apparent "absence" is thus no more "telling" (Opp. 23) than the cat that didn't bark in the night.

Most to the point, there *is* potent "direct evidence," Opp. 23, that the issue is both "'important and recurring'" *id.* (quoting Pet. 28). The EEOC has filed amicus curiae briefs on the issue in multiple courts of appeals, see Pet. 19, and the relevant portions of the *Mack* and *Parkins* opinions (and their progeny) have been cited in hundreds of decisions at the district court level.[1]

3. Respondent further argues (Opp. 21) that the conflict is not important because the Seventh Circuit (and First and Eighth Circuit) rule is not an *insurmountable* barrier: "numerous plaintiffs" will be able to prevail (or reach a jury) under the negligence standard if these courts are permitted to adhere to their restrictive, erroneous "supervisor"

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[1] A search of the Lexis "Allfeds/Allstates" database for "(mack parkins) /p (supervisor! manag!) & (faragher ellerth)" yields 362 results, 33 from the past year.

case law. If the only decisional conflicts that warranted review were ones that are outcome determinative in every case – or involved rules that prevented *every* deserving plaintiff from winning, the bar for certiorari would be high, indeed. And any claim that there is no "outcome-determinative conflict," Opp. 20, is refuted by decisions on both sides of the divide, such as *Rhodes* and *Mack* – and *Faragher* itself – where the choice between rules determined which party was entitled to judgment as a matter of law.

The contention (Opp. 21-22) that there is no important difference between the negligence and vicarious liability standards would presumably surprise the parties in *Faragher* and *Ellerth*, not to mention the Justices who granted certiorari – and divided – in those cases, see *Ellerth*, 524 U.S. at 769-770 (Thomas, J., dissenting). While the negligence standard *Faragher/Ellerth* rejected for supervisor harassment and the vicarious-liability/affirmative-defense it imposed are "akin," Opp. 6, in that both consider employers' "preventive [and] corrective" actions, *Ellerth*, 524 U.S. at 765, the latter requires defendants seeking to avoid liability to show that the victim "unreasonably failed to take advantage" of these, *ibid.* That showing is a difficult one, and Ball State does not claim it could be made here.

4. As noted, the Opposition does not make even a token effort to show that the Seventh Circuit's "supervisor" definition, which supplied the rule of decision below, is correct or preferable to its competitors or even to defend it against charges, leveled by other courts and the EEOC, that it is irreconcilable with both the specific holding of *Faragher* – which found employer responsibility, on

the "supervisor" standard, for harassment by a higher-ranking lifeguard who did not have authority to "hire, fire, demote, promote, transfer, or discipline" the plaintiff – and its underlying rationale.[2]

II. RESPONDENT ADVANCES NO VALID REASON FOR AWAITING ANOTHER CASE PRESENTING THIS SAME ISSUE

Unable to muster a convincing argument against the need for the Court to settle this sharp and clear split, respondent asks that it "wait for a [different] case" in which the same question is presented. Opp. at 20. Postponement is warranted, respondent offers, because petitioner's hostile environment claim was "carefully considered" and "correctly rejected" in the courts below, *ibid.*, and because, respondent says, other "problem[s] with petitioner's action," *ibid.*, unrelated to the disputed "supervisor" definition, make this an "unattractive vehicle," *ibid.*

1. To begin, this plea is in obvious, if unacknowledged, tension with respondent's

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[2] As those authorities explain, harassers like Davis (and those in *Mack* and *Rhodes*), who are vested with "immediate" *Faragher*, 524 U.S. at 807, supervisory authority are, as a matter of workplace reality, often better "able to impose unwelcome [conduct]," *Ellerth*, 524 U.S. at 763 (citation omitted), than those with personnel powers, whose jobs entail infrequent contact with lower-level employees, see *Rhodes*, 359 F.3d at 509 (Rovner, J., concurring); and the "risks of blowing the whistle," *Faragher*, 524 U.S. at 803, on harassers who have employer-conferred assignment and oversight authority are significant. See *ibid.* (noting threat to assign plaintiff toilet cleaning); *Burlington Northern & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 70 (2006).

observation that cases in which the issue is addressed – involving individual claimants and modest monetary relief – seldom culminate in petitions. See p. 5, *supra*.

Moreover, the only "consider[ation]" Vance's Title VII claim received was under the disputed – incorrect – legal standard. See App. 12a-13a. None of the issues respondent largely devotes the Opposition would prevent or even complicate the Court's reaching and resolving the question presented; indeed, none was passed upon by the Seventh Circuit.[3]

2. Nor are respondent's *ipse dixit* assertions about what the "facts" or "undisputed facts" of this case (Opp. 2) establish, *e.g.*, "that Davis was [not] a supervisor * * * under the EEOC guidelines," *id.* at 25 – any basis for withholding review. None of the "four Judges" below (Opp. 30) so found, and both opinions are fairly read as assuming that petitioner's evidence *did* raise a triable issue, but for the strictures of the *Parkins* rule. See App. 12a-13a; accord *id.* at 54a.

What respondent effectively asks – that the Court sit, at the petition stage, as a court of "first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 719 n.7 (2005), applying a fact-dependent legal standard to a large

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[3] The appeals court assumed that each of the other elements of the hostile environment claim was established, see App. 15a; and far from pronouncing the district court's resolution "well-reasoned," Opp. 13, the court was critical of the lower court's analysis, see App. 14a-15a – and pointedly admonished district courts and future litigants against misreading this Court's Title VII law as Ball State had. *Ibid.*

and disputed summary judgment record – would be an extraordinary use of "its scarce resources," Opp. at 20. Even after a merits ruling, when "courts below applied an incorrect legal standard," the Court usually will "not consider whether the result would be supportable * * * had the correct one been applied." *Malat* v. *Riddell*, 383 U.S. 569, 572 (1966).

If the Court were to take up that invitation, however, it would find a more basic problem with respondent's attention-getting assertions. Although "evidence" supporting a finding that "Davis had [supervisory] authority," Opp. at 2, is "absen[t]" from *respondent's discussion of the facts*, it is readily found in the summary judgment record.

For example, respondent depicts as devastating that Davis's job title, "Catering Specialist," did not include the word "supervisor" – and even reproduces as an appendix a directory attesting to that, see Opp. at 3-4 n.2; Add. 1a-6a. But the University's official description of that position begins "***Positions Supervised:*** **Kitchen Assistants and Substitutes**," Pet. Summ. J. Br. Exh. 2 (No. 1:06-cv-1452-SEB-JMS) (emphasis added), and prominent among the "responsibilities/duties" enumerated there are "[l]ead[ing,] direct[ing,] * * * and overseeing the[] work" of substitute and part-time employees, *id.* See Opp. at 7 (Vance was a "substitute" and then "part-time" employee from 1989 to 2007).[4]

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[4] While respondent insists that "those employees who were supervisors are referred to * * * as 'supervisors,'" Opp. 3-4 n.2, Kimes, who respondent stresses was one of Vance's supervisors, is "referred to," *ibid*, as "manager," as are numerous other high-ranking officers who, like

And though the district court noted "BSU's *position*," that Davis had "[n]ever been a supervisor," Opp. 3 (citing App. 54a n.17), the *evidence* was that Kimes, when asked at deposition whether Davis was "part of management," answered, "that's complicated," Resp't Summ. J. Br. Exh. B at 3 (No. 1:06-cv-1452-SEB-JMS), and admitted (as documentary evidence confirmed) that Davis assigned work to and "direct[ed]" Vance and other employees. *Ibid.*[5]

* * * * *

The "problems" Ball State purports to find with petitioner's case are of its own devising. The entrenched and important conflict on the question

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Davis, are listed above employees whose titles include "supervisor." See Add. 1a-5a.

[5] This reticence to present the evidence in a reasonably neutral light, let alone the one favorable to petitioner the law requires, necessarily compromises respondent's proffered "comparison" of the "circumstances" here and those in other cases. See Opp. 26-28. Indeed, the Opposition's efforts to show dissimilarity lead it to neglect facts supporting *defendants* in those cases. For example, *Smith* v. *Oklahoma City*, 64 Fed. App'x 122, 126-127 (10th Cir. 2003) (cited Opp. 27), vacated judgment for the employer on the issue, despite evidence the harasser was not designated a supervisor and lacked input in the plaintiff's leave, evaluations, or discipline, *ibid.*; and even in *Mack*, where the issue was resolved for the *employee* as a matter of law, the "supervisor" and victim were members of the same collective bargaining unit. See 326 F.3d at 125-126.

presented should be settled by this Court, and the Seventh Circuit's decision here, which rested squarely on its controversial and consequential misreading of this Court's applicable precedents, is a suitable, "[]attractive vehicle" for doing so.[6]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[6] Respondent's claims of "problem[s]" with other elements of petitioner's cause of action have nothing to do with the question presented. But the impression conveyed, that petitioner's hostile environment claim is somehow marginal or synthetic, merits response. The evidence showed not only that Davis casually referred to Vance, the lone African American in an 140-employee department, as "Sambo" and "Buckwheat" (as others were boasting of "Klan" connections and glaring menacingly at her), but that Davis's conduct went beyond abusive language to acts and threats of physical violence, which left petitioner fearful to be alone in the workplace with her. See Pet. 5-6.

AMICUS CURIAE BRIEF

No. 11-556

In the Supreme Court of the United States

MAETTA VANCE, PETITIONER

v.

BALL STATE UNIVERSITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether an employee must have the power to carry out a tangible employment action, such as hiring, firing, promoting, demoting, transferring, or disciplining an employee, in order to qualify as a supervisor for purposes of vicarious employer liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

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In the Supreme Court of the United States

No. 11-556

MAETTA VANCE, PETITIONER

v.

BALL STATE UNIVERSITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. 42 U.S.C. 2000e-2(a). Actionable discrimination includes harassment that creates a hostile working environment. See, *e.g.*, *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 66 (1986); *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998).

The standard for determining an employer's liability for harassment depends on the harasser's status in the workplace. An employer is vicariously liable for a supervisor's harassment. *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 764-765 (1998). If the victim suffered no tangible employment action however, the employer may assert as an affirmative defense that it exercised reasonable care to prevent and correct harassment and that the employee unreasonably failed to take advantage of the corrective and preventive opportunities. *Faragher*, 524 U.S. at 789, 807; *Ellerth*, 524 U.S. at 760, 764-765. When the harasser is a co-worker rather than a supervisor, the employer is liable if the victim proves that the employer was negligent because it "knew or should have known about the conduct" but failed to take appropriate action. *Ellerth*, 524 U.S. at 759, 765; see also *Faragher*, 524 U.S. at 799.

The Court has stated that the rule of vicarious liability for a supervisor's harassment applies to a "supervisor with immediate (or successively higher) authority." *Faragher*, 524 U.S. at 807. The Court has not, however, defined with specificity which employees qualify as supervisors for the purposes of that rule.

2. Petitioner Maetta Vance, who is black, was hired by respondent Ball State University in 1989 as a substitute server in the University Banquet and Catering division of University Dining Services. She became a part-time catering assistant in 1991. Pet. App. 2a, 27a. Petitioner was involved in various altercations at work, including racially-charged incidents. *Id.* at 1a-2a. Most relevant here are her difficulties with Saundra Davis, a catering specialist who is white.

a. In 1999 or 2001, petitioner and Davis argued, and Davis slapped petitioner on the head. Pet. App. 3a, 18a, 30 n.5. Petitioner told her supervisors about the incident but did not pursue the matter, and Davis was soon transferred to another department. *Id.* at 3a, 30a n.5.

When Davis returned to the University Banquet and Catering division in 2005, the conflicts resumed. Pet. 6; Pet. App. 3a. On September 23, 2005, petitioner and Davis quarreled at the elevator. Davis blocked petitioner from exiting the elevator and said, "I'll do it again"—apparently referring to the slapping incident. *Id.* at 3a, 18a, 29a-30a. Petitioner filed an internal complaint describing the incident. *Id.* at 3a-4a. Around the same time, petitioner overheard Davis joking and using the terms "Sambo" and "Buckwheat" while looking at her, but petitioner apparently did not report those comments. *Id.* at 6a, 59a-61a. Petitioner told her supervisors that she was "not comfortable with Saundra Davis leaving her notes and delegating jobs to her in the kitchen." 1:06-cv-01452 Docket entry No. (Docket entry No.) 59-16, at 2 (S.D. Ind. Nov. 1, 2007); *id.* No. 59-19, at 3.

In May 2006, petitioner filed another internal complaint alleging that Davis blocked her way at the elevator, that she was left alone with Davis in the kitchen, and that Davis gave her "weird" looks. Pet. App. 6a-7a, 37a n.8. In response to petitioner's various complaints, managers attempted to separate her from Davis. Docket entry No. 56-6, at 3.

b. During this period, petitioner also had difficulties with others in the department. In September 2005, someone told petitioner that co-worker Connie McVicker had bragged about her family ties to the Ku Klux Klan and had called petitioner a "nigger." Pet. App. 3a,

31a-32a. Petitioner reported the incident, and Bill Kimes, general manager of the Banquet and Catering Division, gave McVicker a written warning, which was atypical for a first offense. Pet 7; Pet. App. 4a-5a, 33a n.6, 34a-35a. A few days later, another supervisor met with McVicker and suggested she consider a transfer. Pet. App. at 35a. Petitioner also reported that McVicker had called her a "monkey." *Id.* at 5a, 35a. In December 2005, petitioner filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging, *inter alia*, race discrimination. *Id.* at 6a, 36a.

In 2006, petitioner alleged that Karen Adkins, an assistant personnel director, was "mean mugging" and following petitioner at work. Pet. App. 7a, 37a n.8. Petitioner also filed an internal retaliation complaint against Kimes. *Id.* at 7a, 40a. Respondent investigated the complaints but found no basis for disciplinary action. *Id.* at 37a n.8, 40a-41a. In August 2006, petitioner filed a second complaint with the EEOC, claiming that respondent had retaliated against her by diminishing her duties, withholding her breaks, denying her overtime, and disciplining her unequally. *Id.* at 7a, 40a.

c. Petitioner filed this suit in October 2006, alleging that she was subjected to a hostile work environment and was retaliated against for complaining about discrimination, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. App. 7a, 51a.

In January 2007, respondent promoted petitioner to a full-time catering assistant. Pet. App. 27a, 41a. Petitioner's troubles with Davis and others continued. Petitioner claimed that she was consigned to "entry level duties" such as cutting up celery sticks. *Id.* at 43a, 71a. Petitioner further alleged that in August 2007, Davis encountered petitioner at an elevator and said, "Are you

scared?" in a southern accent. *Id.* at 38a. Petitioner complained, and Davis received a verbal warning. *Ibid.* Also that month, petitioner filed a grievance about an incident in which McVicker said "payback" as petitioner walked onto the service elevator. *Id.* at 37a, 63a.

d. On petitioner's various complaint forms, she listed Davis as a "supervisor." Docket entry No. 59-1; *id.* No. 60-12, at 1; *id.* No. 59-8, at 2. But when asked in a deposition if Davis was her supervisor, petitioner said, "[O]ne day she's a supervisor; one day she's not. * * * It's inconsistent." Pet. App. 54a. Petitioner believed Davis was "part of management because she doesn't clock in." *Ibid.* Another employee said he was unsure of Davis's status, but claimed that Kimes told him Davis was a supervisor. Docket entry No. 61-10, at 4. Kimes characterized Davis's status as "complicated" and said that Davis did "direct and lead" at times. Reply Br. 11; Docket entry No. 56-6, at 3. Davis's job description states that she supervises "[k]itchen [a]ssistants and [s]ubstitutes," and exercises "leadership of up to 20 part-time, substitute, and student employees." Reply Br. 10; Docket entry No. 62-17, at 1. Petitioner's day-to-day tasks were generally assigned by Kimes or the kitchen chef. Pet. App. 27a, 41a-42a; Br. in Opp. 25.

3. After extensive discovery, the district court granted summary judgment in favor of respondent. Pet. App. 25a-80a.

a. The court initially concluded that Davis did not qualify as petitioner's supervisor and that respondent therefore was not vicariously liable for Davis's conduct. Pet. App. 53a-55a. The court applied circuit precedent holding that "[a] supervisor is someone with the power to directly affect the terms and conditions of the plaintiff's employment," *id.* at 53a (citing *Rhodes* v. *Illinois*

Dep't of Transp., 359 F.3d 498, 506 (7th Cir. 2004)), which authority "primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee," *ibid.* (quoting *Hall* v. *Bodine Elec. Co.*, 276 F.3d 345, 355 (7th Cir. 2002)). Accordingly, the court ruled, even assuming "Davis periodically had authority to direct the work of other employees, such power would still not be sufficient to establish a supervisory relationship for purposes of Title VII." *Id.* at 54a.

b. The court evaluated petitioner's mistreatment by Davis and McVicker under the standard for harassment by co-workers. Pet. App. 59a-68a. The court explained that most of the incidents involving Davis had "no racial character or purpose," and that Davis's arguably racial remarks were "not sufficiently severe or pervasive" to support a hostile work environment claim. *Id.* at 59a-60a. The court concluded that McVicker's racial statements did not "rise to the level of actionable harassment." *Id.* at 61a-63a.

The court further concluded that, even if petitioner had suffered severe or pervasive racial harassment by Davis and McVicker, she could not demonstrate a basis for employer liability. Petitioner could not establish that respondent was negligent because respondent had addressed petitioner's complaints in a way "reasonably calculated to foreclose subsequent harassment." Pet. App. 60a-61a, 63a-66a.

c. The court also rejected petitioner's claims against other employees and her claim of unlawful retaliation. Pet. App. 55a-59a, 68a-80a.

4. The court of appeals affirmed. Pet. App. 1a-24a. Of particular salience, the court of appeals agreed with the district court that Davis was not petitioner's supervisor because Davis lacked the "power to directly affect

the terms and conditions of [petitioner's] employment" by hiring, firing, demoting, promoting, transferring, or disciplining her. *Id.* at 12a (quoting *Rhodes*, 359 F.3d at 506) (emphasis omitted). The court observed that it "ha[d] not joined other circuits in holding that the authority to direct an employee's daily activities establishes supervisory status under Title VII." *Id.* at 12a-13a. The court thus held that petitioner's assertion "that Davis had the authority to tell her what to do" failed to raise a triable issue concerning supervisor status. *Id.* at 13a.

Applying the standard for co-worker harassment, the court assumed that McVicker and Davis had created a hostile work environment. Pet. App. 15a. The court concluded, however, that respondent was not negligent because it "promptly investigat[ed] each of [petitioner's] complaints and t[ook] disciplinary action when appropriate." *Ibid.*; see *id.* at 15a-19a. The court also upheld the district court's rejection of petitioner's remaining claims. *Id.* at 13a-14a, 19a-24a.

DISCUSSION

The court of appeals' understanding of who qualifies as a supervisor for purposes of an employer's vicarious liability for harassment under Title VII is inconsistent with this Court's application of agency principles in *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 807 (1998), and *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742, 764-765 (1998), and it ignores the practical realities of the workplace. It also conflicts with the EEOC's longstanding enforcement guidance defining who constitutes a supervisor. The issue is important, and the circuits disagree on the proper understanding of supervisor status.

This case, however, would be an unsuitable vehicle for resolving that disagreement. On the record before this Court, Davis would fail to qualify as petitioner's supervisor even under the broader interpretation of that term applied by certain courts of appeals and by the EEOC. This Court therefore would be called upon to decide the question presented by the petition in the abstract, without a concrete factual setting in which to test the merits of the competing approaches or understand their practical implications, and in a context in which the Court's resolution of the issue likely would not affect the disposition of petitioner's suit. The Court therefore should deny the petition.

A. The Court Of Appeals Erred In Holding That An Employee Must Have The Authority To Take Tangible Employment Actions To Qualify As A Supervisor For Purposes Of Vicarious Employer Liability Under Title VII

1. a. The term "supervisor" does not appear in Title VII. Title VII, however, imposes liability on employers for the actions of their "agents." 42 U.S.C. 2000e(b) (defining "employer" to include an agent of the employer); see also *Faragher*, 524 U.S. at 791. Accordingly, in *Faragher* and *Ellerth*, this Court relied on agency principles to determine the scope of vicarious employer liability under Title VII. The Court concluded that an employer could be vicariously liable for harassment by a supervisor, even if the supervisor is acting outside the scope of his employment, because agency principles support an employer's vicarious liability for torts committed by a servant in those circumstances if the servant "was aided in accomplishing the tort by the existence of the agency relation." *Faragher*, 524 U.S. at 801 (quoting Restatement (Second) of Agency § 219(2)(d) (1957)); see

also *Ellerth*, 524 U.S. at 759. The Court explained that a supervisor's harassment of a subordinate is aided by the agency relationship because "[t]he agency relationship affords contact with an employee subjected to a supervisor's * * * harassment, and the victim may * * * be reluctant to accept the risks of blowing the whistle on a superior." *Faragher*, 524 U.S. at 803. The Court thus held that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." *Id.* at 807.

b. The court of appeals held that a "supervisor" for purposes of vicarious employer liability under *Faragher* and *Ellerth* is a person who has the "power to *directly* affect the terms and conditions of [the victim's] employment," which the court understood as "primarily consist[ing] of the power to fire, hire, demote, promote, transfer, or discipline an employee." Pet. App. 12a (citation omitted). That understanding is unduly restrictive.

An employee's "reluctan[ce] to accept the risks of blowing the whistle on a superior," *Faragher*, 524 U.S. at 803, is not confined to situations where the harasser has the power to take tangible employment actions against the victim. See *Ellerth*, 524 U.S. at 761 (explaining that a "tangible employment action constitutes a significant change of employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits"). It may be equally difficult for a victim to "walk away or tell the offender where to go," *Faragher*, 524 U.S. at 803, when the harasser, while lacking authority to take tangible employment actions, directs the victim's daily work activities. See *id.*

at 780 (life guard captain told victim "date me or clean the toilets for a year"); *Whitten* v. *Fred's, Inc.*, 601 F.3d 231, 246 (4th Cir. 2010) (store manager "could change [victim's] work schedule and impose unpleasant duties on a whim") (internal quotation marks and citation omitted); *Weyers* v. *Lear Operations Corp.*, 359 F.3d 1049, 1057 (8th Cir. 2004) ("team leader" kept victim from training opportunities and signed performance evaluations); *Hall* v. *Bodine Elec. Co.*, 276 F.3d 345, 355 (7th Cir. 2002) ("set-up operator" directed tasks, trained victim, and contributed to performance evaluations).

This Court recognized as much in *Faragher*, observing that it may be difficult for a victim to respond "to a supervisor, whose 'power to supervise—[which may be] to hire and fire, *and to set work schedules* and pay rates—does not disappear . . . when he chooses to harass through insults and offensive gestures.'" *Faragher*, 524 U.S. at 803 (quoting Susan Estrich, *Sex at Work*, 43 Stan. L. Rev. 813, 854 (1991) (emphasis added)). *Faragher* and *Ellerth* hold that an employer is subject to vicarious liability for a hostile environment created by "a supervisor with immediate (or successively higher) authority over the employee," *id.* at 807, and an employee who controls work assignments and schedules certainly may possess "immediate," day-to-day authority over a victim notwithstanding a lack of power to take tangible employment actions.

The court of appeals' approach also cannot be squared with this Court's resolution of the specific claims in *Faragher*. The Court concluded that the employer was vicariously liable for harassment by two supervisors, one of whom had no authority to effect tangible employment actions. Lifeguard captain David Silverman was "responsible for making the [employees']

daily assignments, and for supervising their work and fitness training." 524 U.S. at 781, 810. In contrast, Bill Terry, Chief of the Marine Safety Division, had "authority to hire new [employees] (subject to the approval of higher management), to supervise all aspects of [their] work assignments, to engage in counseling, to deliver oral reprimands, and to make a record of any such discipline." *Id.* at 781. The Court upheld vicarious liability for both Silverman's and Terry's actions, explaining that "these supervisors were granted virtually unchecked authority over their subordinates, directly controll[ing] and supervis[ing] all aspects of [Faragher's] day-to-day activities." *Id.* at 808 (internal quotation marks and citation omitted). Under the court of appeals' restrictive approach, however, the employer in *Faragher* would not have been liable for Silverman's harassment because he lacked authority to take tangible employment actions.

c. The court of appeals' unduly restrictive understanding of supervisor status undermines Title VII's objectives. The primary object of Title VII is not "to provide redress but to avoid harm." *Faragher*, 524 U.S. at 806; see also *Ellerth*, 524 U.S. at 764. Properly applied, the affirmative defense provided in *Faragher* and *Ellerth*—through which an employer can avoid liability for supervisor harassment in certain circumstances by showing that it exercised reasonable care to prevent and correct harassment and that the employee unreasonably failed to take advantage of those corrective opportunities—encourages employers to screen supervisors, monitor them, and establish effective training and complaint programs. *Faragher*, 524 U.S. at 803; *Ellerth*, 524 U.S. at 764-765. But if employers face vicarious liability only for supervisors with power to take tangible employment actions, employers could insulate themselves from liabil-

ity simply by centralizing personnel decisions in a department that may have indirect or infrequent contact with the victim, leaving workers vulnerable to harassment by those with the greatest day-to-day ability to create intolerable working conditions.

The Court recently addressed a similar problem in *Staub* v. *Proctor Hospital*, 131 S. Ct. 1186 (2011), a case arising under the Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103-353, 108 Stat. 3149, a statute that the Court has recognized "is very similar to Title VII." *Staub*, 131 S. Ct. at 1191. In *Staub*, the employer fired the plaintiffs based in part on reports from biased supervisors. The Court concluded that the employer could be liable for the discharge even though an unbiased vice president of human resources took the challenged tangible employment action. Otherwise, the Court explained, an employer could "be effectively shielded from discriminatory acts and recommendations of supervisors" by vesting ultimate authority for personnel decisions in an independent official. *Id.* at 1193. By providing for vicarious employer liability only if a harasser possesses authority to take tangible employment actions against the victim, the court of appeals' approach ignores the practical realities of the workplace and disserves the core purposes of Title VII.

2. The court of appeals' decision is inconsistent with the EEOC's longstanding enforcement guidance defining supervisor status. Shortly after the Court decided *Faragher* and *Ellerth*, the EEOC issued enforcement guidance defining who constitutes a supervisor for purposes of vicarious employer liability under Title VII. EEOC, *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, 8

FEP Manual (BNA) 405:7654 (1999), *available at* 1999 WL 33305874 (reproduced at Pet. App. 81a-93a) (EEOC Guidance). The guidance provides that an individual qualifies as an employee's supervisor if:

> a. the individual has authority to undertake or recommend tangible employment decisions affecting the employee; *or*
>
> b. the individual has authority to direct the employee's daily work activities.

Pet. App. 90a (emphasis added). That guidance is "an administrative interpretation of [Title VII] by the enforcing agency," and "constitute[s] a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 65 (1986) (quotation marks and citations omitted).

The EEOC explained that, because vicarious liability for supervisor harassment under *Ellerth* and *Faragher* is justified by the harasser's misuse of delegated authority, "that authority must be of sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment." Pet. App. 89a. The EEOC further explained that, when an employee has authority to direct another's day-to-day work activities, that person's ability to harass "is enhanced by his or her authority to increase the employee's workload or assign undesirable tasks." *Id.* at 91a.

The EEOC's guidance has governed the agency's enforcement actions since 1999, and the EEOC has filed numerous briefs in the courts of appeals setting forth its understanding. See EEOC Br. as Amicus Curiae, *Dulaney* v. *Packaging Corp. of Am.*, 673 F.3d 323 (4th Cir. 2012) (No. 10-2316); EEOC Br., *EEOC* v. *CRST Van*

Expedited, Inc., 2012 WL 1583026 (8th Cir. May 8, 2012) (Nos. 09-3764, 09-3765, 10-1682); EEOC Pet. for Reh'g and Suggestion for Reh'g En Banc, *CRST*, *supra*; EEOC Br. as Amicus Curiae, *Whitten*, *supra* (No. 09-1265); EEOC Br. as Amicus Curiae, *Weyers*, *supra* (No. 02-3732); EEOC Br. as Amicus Curiae, *Mack* v. *Otis Elevator Corp.*, 326 F.3d 116 (2d. Cir.) (No. 02-7056), cert. denied, 540 U.S. 1016 (2003). The EEOC's consistent position warrants a measure of deference. See *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1335 (2011) (giving weight to EEOC's consistent position set forth in compliance manual and court of appeals briefs).

B. The Circuits Disagree On The Proper Understanding Of Supervisor Status Under *Faragher* And *Ellerth*

As the court of appeals recognized (Pet. App. 12a-13a), the circuits disagree on whether an employee with authority to direct an employee's daily work activities, but without power to take tangible employment actions, qualifies as a supervisor for purposes of vicarious employer liability under Title VII.

1. In its decision below, the court of appeals reiterated its prior holding that an employee qualifies as a supervisor only if he has authority to take tangible employment actions against the victim. Shortly after this Court decided *Faragher* and *Ellerth*, the court of appeals held in *Parkins* v. *Civil Constructors of Illinois, Inc.*, 163 F.3d 1027 (7th Cir. 1998), that supervisory authority under those cases "primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee." *Id.* at 1034. The *Parkins* court explained that "[a]bsent an entrustment of at least some of this authority, an employee does not qualify as a super-

visor for purposes imputing liability to the employer." *Ibid.*

The EEOC issued its enforcement guidance shortly thereafter, and certain judges then called for the court of appeals to reconsider its holding in *Parkins*. See *Rhodes* v. *Illinois Dep't of Transp.*, 359 F.3d 498, 509 (2004), (Rovner, J., concurring in part and concurring in the judgment); *id.* at 510 (Cudahy, J., concurring). The court, however, has continued to hold that employees who assign tasks and recommend discipline fail to qualify as supervisors. *Id.* at 506; see also *Hall*, 276 F.3d at 355 (finding no supervisory status where harasser directed work, contributed to evaluations, and trained victim).

The First Circuit has followed the same approach, holding that a "shift supervisor"—the victim's immediate supervisor—lacked the requisite supervisory authority to trigger vicarious employer liability. *Noviello* v. *City of Boston*, 398 F.3d 76, 95-96 (2005) (applying Title VII standards to parallel provisions in state law and quoting *Parkins*). The court stated that, without authority "to hire, fire, demote, promote, transfer, or discipline an employee," a harasser "should be regarded as an ordinary coworker." *Ibid.* (internal quotation marks and citation omitted).

The Eighth Circuit has also adopted that restrictive understanding. In *Weyers* v. *Lear Operations Corp.*, *supra*, the court held that an alleged harasser failed to qualify as a supervisor even though he assigned the victim's tasks, barred her from training, and signed her performance evaluations. 359 F.3d at 1057. The court explained that it had adopted "the narrower standard of supervisor liability," under which the harasser must have the "power (not necessarily exercised) to take tan-

gible employment action against the victim, such as the authority to hire, fire, promote, or reassign to significantly different duties." *Ibid.*; see also *Joens* v. *John Morrell & Co.*, 354 F.3d 938, 940 (8th Cir. 2004); *CRST Van Expedited*, Nos. 09-3764, 09-3765, 10-1682, 2012 WL 1583026, pet. for reh'g pending (filed May 9, 2012).

2. Other circuits, by contrast, have adopted a broader understanding of supervisor liability. Citing the EEOC guidance, the Second Circuit held in *Mack* v. *Otis Elevator Corp.*, *supra*, that a "mechanic in charge" qualified as a supervisor because he assigned the victim's daily tasks, oversaw her work, assigned overtime, and was typically the senior employee on site. 326 F.3d at 127. The court stated that the relevant question is "whether the authority given by the employer to the employee enabled or materially augmented the ability of the [employee] to create a hostile work environment." *Id.* at 126.

Similarly, the Fourth Circuit held in *Whitten* v. *Fred's, Inc.*, *supra*, that a store manager was an assistant manager's supervisor because he assigned tasks, controlled scheduling, and was usually the senior employee on site. 601 F.3d at 246 (applying *Faragher* and *Ellerth* standard to state law claims). The court observed that the manager used his supervisory authority to order the victim into a storeroom (where she would be alone with him), to revoke her day off after she objected to his touching, and to give her undesirable assignments as punishment. *Ibid.* Such power, "as a practical matter," left the victim "vulnerable to and defenseless" to harassment "in ways that comparable conduct by a mere co-worker would not." *Id.* at 244 (citation and quotation marks omitted).

The Ninth Circuit has not fully defined a test for supervisor status, but has concluded that a victim's "trainer and immediate manager" could be a supervisor if he "engaged in supervision of or had authority over [plaintiff]." *Dawson* v. *Entek Int'l*, 630 F.3d 928, 937, 940 (2011) (construing state law analogous to Title VII); see also *McGinest* v. *GTE Serv. Corp.*, 360 F.3d 1103, 1119 n.13 (2004) (holding supervisory status depends "upon whether a supervisor has the authority to demand obedience from an employee"), cert. denied, 552 U.S. 1180 (2008).[1]

C. This Case Is Not A Suitable Vehicle For Resolving The Disagreement

The question presented is important, and the courts of appeals have adopted divergent approaches. Accordingly, this Court's review of the question presented would be warranted in an appropriate case. This case, however, would not be a suitable vehicle for addressing the issue. The only employee whose supervisory status is in issue is Davis, see Pet. 29, and she would fail to qualify as petitioner's supervisor under the record before the Court under any of the competing approaches. The Court should not address this important question in

[1] Other circuits have addressed the issue in unpublished opinions. *Griffin* v. *Harrisburg Prop. Servs., Inc.*, 421 Fed. Appx. 204, 208-209 (3d Cir. 2011) (citing the Seventh Circuit's standard and noting the alleged harasser's lack of authority to direct plaintiff); *Smith* v. *Oklahoma City*, 64 Fed. Appx. 122, 127 (10th Cir.) (holding alleged harasser could be a supervisor where he provided daily training, testing, and evaluation), cert. denied, 540 U.S. 948 (2003); *Stevens* v. *United States Postal Serv.*, 21 Fed. Appx. 261, 263-264 (6th Cir. 2001) (accepting district court's reasoning that the alleged harasser was not a supervisor, where he "had informal supervisory duties," but no "formal title" and no "power to hire or fire").

a case where it would not affect the outcome and is presented only in the abstract.

1. At the summary judgment phase, the parties engaged in extensive discovery of the facts pertaining to petitioner's claims. There is scant evidence that Davis exercised any authority over petitioner's daily work activities. Insofar as Davis possessed day-to-day authority over petitioner's work, petitioner was the best person to explain that authority, but her 128-page deposition describes no instances in which Davis actually directed her work. Docket entry Nos. 58-2 to 58-7. If Davis had that authority, one would expect petitioner to have recounted various tasks Davis assigned her, identified specific orders or instructions Davis gave her, or related any occasions in which Davis altered her work assignments or schedule. And to meet the EEOC's standard, petitioner would be required to do more than demonstrate that Davis possessed some minimal level of authority over petitioner, because "someone who directs only a limited number of tasks or assignments would not qualify as a 'supervisor.'" Pet. App. 92a (EEOC Guidance).

Petitioner has not even shown that she "reasonably believed" Davis was her supervisor. See Pet. App. 93a (EEOC Guidance) (noting that an employer may be vicariously liable "if the employee reasonably believed that the harasser had [supervisory] power," even if that belief is false). When asked whether she considered Davis her supervisor at the time of their confrontation at the elevator in April 2006, petitioner replied: "I don't know what she is." Docket entry No. 58-5, at 3; see also Pet. App. 54a. Petitioner explained that, "one day she's a supervisor; one day she's not. One day she's to tell people what to do, and one day she's not." *Id.* at 54a. Asked whether Davis was her supervisor even "inter-

mittently, once in a while," petitioner answered that she was "not sure." Docket entry No. 58-5, at 3.[2]

To be sure, petitioner referred to Davis as a "supervisor" or "kitchen supervisor" in various complaint forms. Docket entry No. 59-1; *id.* No. 60-12, at 1; *id.* No. 59-8, at 2. And other employees stated that Kimes had told them Davis was a supervisor. *Id.* No. 61-10, at 4; *id.* No. 62-3, at 1. Davis's job description states she "lead[s] and direct[s]" "kitchen part-time, substitute, and student employee helpers" and supervises "[k]itchen [a]ssistants and [s]ubstitutes." Docket entry No. 62-17, at 1; see also Reply Br. 3, 10. It is unclear whether this included petitioner, who was a part-time "catering assistant" from 1991 to 2007. *Id.* at 10, Pet. App. 2a, 70a.[3] Kimes acknowledged that Davis directed employees "[a]t times." Docket entry No. 56-6, at 3; see also Reply Br. 11; Br. in Opp. 25. But even if Davis was labeled a "supervisor" and her job description characterized her as supervising petitioner, that would not satisfy the EEOC's standard. Nor, similarly, does it matter whether Davis is listed as a "supervisor" on respondent's "Staff List" or other documents. Br. in Opp. 3-4 & n.2; Br. in Opp. Addendum 1a, 5a.

[2] Petitioner's observation that Davis "d[id not] clock in" may indicate that Davis outranked petitioner in the organizational hierarchy, but it does not show that she had authority to direct petitioner's day-to-day activities. Pet. App. 54a; see also *Mikels* v. *City of Durham*, 183 F.3d 323, 334 (4th Cir. 1999) (finding no supervisory status where harasser outranked victim but had "minimal" authority over her).

[3] Petitioner does not allege harassment between 1989 and 1991, when she was a "substitute." After her promotion to a full-time catering assistant in 2007, she would not fall under the document's description of Davis's subordinates. Reply Br. 10; Pet. App. 2a, 27a-28a.

Supervisor status instead "is based on * * * job function rather than job title" and "must be based on the specific facts." Pet. App. 89a-90a (EEOC Guidance). Discovery in this case was extensive, with depositions or affidavits taken from more than a dozen employees. The record also includes numerous memoranda, e-mails, minutes, and other documents. Nevertheless, petitioner identifies no specific facts suggesting that Davis directed her day-to-day work.

In fact, the record indicates that others, not Davis, directed petitioner's day-to-day work. Either Kimes or the chef outlined petitioner's daily tasks on "prep lists." Pet. App. 41a-42a, 72a; Br. in Opp. 25. Davis may have handed petitioner her prep lists on occasion, but the record does not show that Davis prepared them. See Docket entry No. 75-17, at 8. Even under the EEOC's view, someone "who merely relays other officials' instructions regarding work assignments" does not qualify as a supervisor. Pet. App. 92a (EEOC Guidance).

Furthermore, it would not be enough for petitioner to show that Davis occasionally took the lead in the kitchen. An employer may be liable where a temporary supervisor "commits unlawful harassment of a subordinate while serving as his or her supervisor." Pet. App. 92a (EEOC Guidance). But here, the record contains only oblique references to any exercise of authority by Davis, such as Kimes's statement in 2005 that Davis had "given direction to [petitioner]" at some unspecified time. Docket entry No. 59-19, at 4; see also Reply Br. 11; Br. in Opp. 25; Docket entry No. 56-6, at 3. Moreover, Kimes also testified that he "c[ould]n't have [Davis] directing [petitioner]" because of problems between them and that he tried to separate them after petitioner complained. Docket entry No. 56-6, at 3; see also Reply

Br. 11; Br. in Opp. 25. Petitioner does not allege that Davis misused authority to "increase [petitioner's] workload," "assign [petitioner] undesirable tasks," or otherwise mistreat petitioner. Pet. App. 91a (EEOC Guidance). Accordingly, petitioner could not meet the EEOC's standard even if one were to assume, as did the district court, that Davis had "periodic[] * * * authority." *Id.* at 54a; see also *Mikels* v. *City of Durham*, 183 F.3d 323, 334 (4th Cir. 1999) (holding "occasional authority to direct [victim's] operational conduct" does not amount to supervisor status).

2. Because this Court's "function in resolving [circuit] conflicts * * * is judicial, not simply administrative or managerial," it normally decides questions of public importance "in the context of meaningful litigation." *The Monrosa* v. *Carbon Black Exp.*, 359 U.S. 180, 184 (1959). The Court will normally deny review "[i]f the resolution of a clear conflict is irrelevant to the ultimate outcome of the case before the Court." Eugene Gressman et al., *Supreme Court Practice* 248 (9th ed. 2007). In *The Monrosa*, for example, the Court granted certiorari to decide whether a contract provision barring an in personam action was enforceable, but dismissed the writ as improvidently granted after it became clear that "in any event the [plaintiff] will be able to try its claim in the District Court" in rem. 359 U.S. at 183-184. The court stated that it would "await a day when the issue is posed less abstractly." *Id.* at 184; see also *Belcher* v. *Stengel*, 429 U.S. 118 (1976).

Those considerations counsel strongly against granting review here. If the Court were to attempt to resolve the disagreement among the courts of appeals in this case, it would be required to consider in the abstract whether an employer should be held vicariously liable

for the actions of a supervisor who has authority to direct petitioner's daily work activities. That issue would have little practical salience here, because the record fails to demonstrate that Davis in fact directed petitioner's daily work activities or how she did so. The Court thus would be in the position of considering the question presented without the benefit of concrete facts to test the strength or implications of the parties' competing positions.

The Court would better be able to assess the relative merits of the competing definitions of "supervisor" in a case where the harasser plainly had actual or apparent authority to direct the victim's daily activities (and thus where a victim likely would not have felt free to "walk away or tell the offender where to go," *Faragher*, 524 U.S. at 803). Here, however, there is no factual development of the authority ostensibly wielded by Davis over petitioner, and petitioner in fact expressed uncertainty concerning whether Davis was her supervisor at all. Compare *id.* at 801 ("Faragher points to several ways in which the agency relationship aided Terry and Silverman in carrying out their harassment."). The Court should adhere to its normal practice of addressing the question presented in a case in which the facts squarely and plainly implicate the disagreement among the circuits, so that it could consider the merits of the competing standards in a context affording an informed understanding of the practical and legal implications of adopting one or the other approach.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JOINT APPENDIX

RECORD
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No. 11-556

In the Supreme Court of the United States

MAETTA VANCE,

Petitioner,

v.

BALL STATE UNIVERSITY,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

JOINT APPENDIX

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E-mail from Ann Talley to William J. Kimes
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Dkt. No. 56-16 392

Verified Statement of Amy Geesaman,
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Affidavit of Melissa Rubrecht,
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Affidavit of Karen Adkins,
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Affidavit of Maetta Vance,
Dkt. No. 75-24 415

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Dkt. No. 56-13 436

Ball State University "Employee Handbook,"
Dkt. No. 75-15 446

Ball State University Banquet and Catering Staff,
Docket No. 62-8 451

Ball State University Residence Halls
Dining Service Organizational Chart,
Dkt. No. 56-1 458

OPINIONS, JUDGMENTS AND ORDERS CONTAINED IN THE PETITION APPENDIX

The following opinions, judgments and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Writ of Certiorari:

Opinion of the U.S. Court of Appeals for the Seventh Circuit, dated June 3, 2011 ..... 1a

Entry on Pending Motions of the U.S. District Court for the Southern District of Indiana, dated September 10, 2008 ..... 25a

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 08-3568

Maetta Vance, Plaintiff-Appellee,

v.

Ball State University, *et al.*, Defendants-Appellants.

Appeal from Southern District of Indiana
Indianapolis Division

Date Filed	#	Docket Text
10/09/2008	1	Private civil case docketed. Fee paid. Docketing statement filed. Transcript information sheet due by 10/24/2008. Appellant's brief due on or before 11/18/2008 for Maetta Vance. * * *
10/10/2008	2	Amended docketing statement filed by Appellant Maetta Vance. * * *
* * *		
12/07/2009	25	Notice to the District Court to transmit the record on appeal. * * *
12/18/2009	26	Original record on appeal filed. Contents of record : 2 vol. of electronic pleadings; 1 vol. of electronic loose pleadings; 2 vol. of

		electronic exhibits; 3 UNDER SEAL documents electronically filed. * * *
		* * *
07/08/2010	39	15 copies Appellant's brief filed by Appellant Maetta Vance. * * *
07/08/2010	40	Filed 10 copies Appendix by Appellant Maetta Vance. * * *
		* * *
10/20/2010	47	15 copies Appellee's brief filed by Appellees Karen Adkins, Ball State University, Saundra Davis, William Kimes and Connie McVicker. * * *
		* * *
11/03/2010	50	Argument set for Monday, 11/29/2010, at 10:00 a.m. in the Main Courtroom, Room 2721. Each side limited to 15 minutes. * * *
11/10/2010	51	15 copies Appellant's reply brief filed by Appellant Maetta Vance, DIST. * * *
		* * *
11/29/2010	55	Case heard and taken under advisement by panel: William J. Bauer, Circuit Judge; Diane P. Wood, Circuit Judge and Diane S. Sykes, Circuit Judge. * * *
		* * *

06/03/2011	58	Filed opinion of the court by Judge Wood. AFFIRMED. William J. Bauer, Circuit Judge; Diane P. Wood, Circuit Judge and Diane S. Sykes, Circuit Judge. * * *
06/03/2011	59	ORDER: Final judgment filed per opinion. With costs: yes. * * *
06/27/2011	60	Mandate issued. No record to be returned. * * *
		* * *
11/03/2011	62	Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. * * *
06/25/2012	63	Filed order from the Supreme Court GRANTING the Petition for Writ of Certiorari. * * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

No. 1:06-cv-1452-SEB-JMS

Maetta Vance, Plaintiff,

v.

Ball State University, *et. al.*, Defendants.

Date Filed	#	Docket Text
10/03/2006	1	COMPLAINT against all defendants with Jury Demand, filed by Plaintiff, MAETTA VANCE. * * *
		* * *
11/22/2006	25	ANSWER to Complaint, filed by BALL STATE UNIVERSITY. * * *
11/22/2006	26	MOTION to Amend/Correct Answer to Complaint, filed by Defendants BALL STATE UNIVERSITY, WILLIAM KIMES, SAUNDRA DAVIS, KAREN ADKINS, CONNIE MCVICKER. * * *
12/13/2006	27	ORDER granting defts' 26 Motion to file amended answer and affirmative defenses. * * *
12/13/2006	28	AMENDED ANSWER AND AFFIRMATIVE DEFENSES to

		Complaint, filed by Defendants BALL STATE UNIVERSITY, WILLIAM KIMES, SAUNDRA DAVIS, KAREN ADKINS and CONNIE MCVICKER. * * *
* * *		
11/01/2007	52	MOTION to Dismiss *Partial*, filed by Defendants BALL STATE UNIVERSITY, WILLIAM KIMES, SAUNDRA DAVIS, KAREN ADKINS, CONNIE MCVICKER. * * *
11/01/2007	53	BRIEF/MEMORANDUM in Support re 52 MOTION to Dismiss *Partial*, filed by Defendants BALL STATE UNIVERSITY, WILLIAM KIMES, SAUNDRA DAVIS, KAREN ADKINS, CONNIE MCVICKER. * * *
11/01/2007	54	MOTION for Summary Judgment, filed by Defendants BALL STATE UNIVERSITY, WILLIAM KIMES, SAUNDRA DAVIS, KAREN ADKINS, CONNIE MCVICKER. * * *
11/01/2007	55	BRIEF/MEMORANDUM in Support re 54 MOTION for Summary Judgment, filed by Defendants BALL STATE UNIVERSITY, WILLIAM KIMES, SAUNDRA DAVIS, KAREN ADKINS, CONNIE MCVICKER. * * *
* * *		

11/30/2007	74	Cross MOTION for Summary Judgment *Plaintiff's Cross Motion for Partial Summary Judgment*, filed by Plaintiff MAETTA VANCE. * * *
	* * *	
11/30/2007	76	BRIEF/MEMORANDM in Support re 54 Cross MOTION for Summary Judgment *Plaintiff's Cross Motion for Partial Summary Judgment*, filed by Plaintiff MAETTA VANCE. * * *
11/30/2007	78	RESPONSE in Opposition re 52 MOTION to Dismiss *Partial*, filed by Plaintiff MAETTA VANCE. * * *
	* * *	
12/26/2007	85	REPLY in Support of Motion re 52 MOTION to Dismiss *Partial*, filed by Defendants BALL STATE UNIVERSITY, WILLIAM KIMES, SAUNDRA DAVIS, KAREN ADKINS, CONNIE MCVICKER. * * *
12/26/2007	86	RESPONSE in Opposition re 54 MOTION for Summary Judgment, 74 Cross MOTION for Summary Judgment *Plaintiff's Cross Motion for Partial Summary Judgment Opposition to Cross-Motion for Summary Judgment and Reply in Support of Motion for Summary Judg-*

		ment, filed by Defendants BALL STATE UNIVERSITY, WILLIAM KIMES, SAUNDRA DAVIS, KAREN ADKINS, CONNIE MCVICKER. * * *
		* * *
01/18/2008	103	REPLY in Support of Motion re 74 Cross MOTION for Summary Judgment *Plaintiff's Cross Motion for Partial Summary Judgment*, filed by Plaintiff MAETTA VANCE. * * *
		* * *
01/22/2008	108	Surreply re: 52 MOTION to Dismiss *Partial Plaintiff's Sur-Reply to Defendants' Reply Brief in Support of Motion for Partial Dismissal*, filed by Plaintiff MAETTA VANCE. * * *
		* * *
02/15/2008	120	ORDER granting in part and denying in part defendants' 52 Motion to Dismiss (S.O.). * * *
		* * *
03/17/2008	125	MOTION to Strike 124 Affidavit in Support *Plaintiff's March 12, 2008 Submissions*, filed by Defendants BALL STATE UNIVERSITY, WILLIAM KIMES, SAUNDRA DAVIS, KAREN ADKINS, CONNIE MCVICKER. * * *

03/18/2008	126	BRIEF/MEMORANDUM in Support re 125 MOTION to Strike 124 Affidavit in Support *Plaintiff's March 12, 2008 Submissions* MOTION to Strike 124 Affidavit in Support *Plaintiff's March 12, 2008 Submissions*, filed by Defendants BALL STATE UNIVERSITY, WILLIAM KIMES, SAUNDRA DAVIS, KAREN ADKINS, CONNIE MCVICKER. * * *
04/01/2008	127	RESPONSE in Opposition re 125 MOTION to Strike 124 Affidavit in Support *Plaintiff's March 12, 2008 Submissions* MOTION to Strike 124 Affidavit in Support *Plaintiff's March 12, 2008 Submissions*, filed by Plaintiff MAETTA VANCE. * * *
04/03/2008	128	REPLY in Support of Motion re 125 MOTION to Strike 124 Affidavit in Support *Plaintiff's March 12, 2008 Submissions* MOTION to Strike 124 Affidavit in Support *Plaintiff's March 12, 2008 Submissions*, filed by Defendants BALL STATE UNIVERSITY, WILLIAM KIMES, SAUNDRA DAVIS, KAREN ADKINS, CONNIE MCVICKER. * * *
* * *		

09/10/2008	134	ENTRY on Pending Motions; ORDER granting 54 Motion for Summary Judgment; denying 74 Motion for Summary Judgment; denying 77 Motion; granting 125 Motion to Strike; (S.O.) Signed by Judge Sarah Evans Barker on 9/10/08. * * *
09/10/2008	135	CLOSED JUDGMENT in favor of Defendants against Plaintiff. Each Party shall bear its own costs. Signed by Judge Sarah Evans Barker on 9/10/08. * * *
10/08/2008	136	NOTICE OF APPEAL as to 135 Closed Judgment, 134 Order on Motion for Summary Judgment Order on Motion to Strike Order on Motion in Limine, filed by Plaintiff MAETTA VANCE. * * *
10/08/2008	137	DOCKETING STATEMENT by MAETTA VANCE re 136 Notice of Appeal. * * *
* * *		
10/09/2008	141	DOCKETING STATEMENT by MAETTA VANCE re 136 Notice of Appeal. * * *
10/09/2008	142	USCA Case Number 08-3568 for 136 Notice of Appeal filed by MAETTA VANCE. * * *
* * *		

12/18/2009	146	Appeal Remark re 136 Notice of Appeal: Long record received and docketed by the USCA on 12/18/09. * * *
		* * *
11/29/2010	150	Supplemental Record on Appeal transmitted to US Court of Appeals, via email, re 136 Notice of Appeal. * * *
11/30/2010	151	Appeal Remark re 136 Notice of Appeal: Supplemental record received and docketed by the USCA. * * *
06/27/2011	152	MANDATE of USCA as to 136 Notice of Appeal filed by MAETTA VANCE – The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date. * * *

BALL STATE UNIVERSITY
POSITION DESCRIPTION
"Catering Specialist"
Dkt. No. 62-16

***Department*:** University Banquet and Catering
Dept. Code: 3-33900
Position Title: Catering Specialist
PC#: 509032
Reports to: Chef
Salary Grade: 9 N
8/2001
Human Resources Representative: D. Baker

This description is intended to indicate the kinds of duties and level of difficulty required of positions at this salary grade; it is not intended to limit the right of any supervisor to assign, direct and control the work of an employee under his/her supervision.

Positions Supervised:

Kitchen Assistants and Substitutes.

Position Function:

Organize workload and prepare all types of catered foods, baked goods, gourmet garniture, and catering quality presentations for served and buffet meals, receptions, and all types of catered events to groups of up to 1200 people under firm deadlines; requires leadership of up to 20 part-time, substitute, and student employees in the preparation and presentation processes.

Duties/Responsibilities:

1. Execute a frequently heavy workload of multiple and simultaneous catered events and menus with ease and minimum stress while helping maintain a fun, creative, and relaxed work environment.

2. Lead and direct kitchen part-time, substitute, and student employee helpers via demonstration, coaching, and overseeing their work to promote efficiency and excellence.

3. Prepare soups, salads, meats, fish, pasta/rice and other starches, vegetables, gravies, sauces, yeast and quick breads, cakes, pies, cookies and bars, desserts, and garniture from scratch recipes, parbaked goods, mixes, and other preparations using prescribed recipes and yielding finished products that exhibit catering excellence; complete manual service records as required.

4. Execute high productivity: the ability and skills to work at high speed and efficiency to complete a large amount of work in a small period of time while maintaining excellence in the finished product and high standards of sanitation, HACCP (Hazard Analysis Critical Control Point), mis en place, and presentation.
5. Execute excellent time planning and time management techniques in timing the production of foods so that foods are freshly prepared, held a minimum time before service,

properly heated or chilled as required and dishes are finished as close to serving time as possible to achieve the highest possible quality at the point of service; foods must be ready for plating and service by the time contracted; plan and consult with chef and/or General Manager daily; develop a work plan for several days ahead so as to even out workload, then work ahead to effectively execute multiple or difficult preparations.

6. Sample judge, and correct food products for proper seasoning, temperature, and texture; make good judgements as relates to food product quality and its suitability for catering service.

7. Demonstrate friendliness and cooperation with chef, co-workers, supervisors, clients, and others in the workplace.

8. Utilize mis en place, keep work area clean and well organized while working and leave spotlessly clean at the end of the workshift; maintain high standards of sanitation and comply with HACCP, Indiana Food Code, and department regulations as relates to food preparation, food temperatures, food storage and labeling, food handling, personal hygiene, and other aspects of ensuring the service of healthful, safe food; clean up floor spills; maintain proper dress code and rules of appearance (see Employee Handbook); scrape, rinse, and properly soak pots, pans, and kitchen tools.

9. Correctly assemble, sanitize, operate, and clean all commercial food service equipment and small tools and appliances using correct safety procedures to prevent injury; perform deep cleaning as needed to keep equipment free of char discoloration, grease build-up, and other soil.

10. Check on ingredients prior to use to be sure an adequate amount is on hand and that they are in the proper condition and quality for use; report substandard ingredients to chef; gather own ingredients and supplies requiring lifting up to 35 pounds unassisted and properly package and return unused amounts to storage; update contracts daily to ensure proper amounts are prepared; calculate manual recipe increases or decreases; utilize computer to access recipes as needed; deliver soiled towels to proper area.

11. May telephone vendors to place food orders; may manually wash pots, pans, and tools; may work in the dish room.

12. Perform other related duties as assigned; other duties may be added as the need arises.

All of the above essential functions require varying degrees of independence, judgment, and discretion and the ability to be mobile within the office and/or work area. Requires the ability to efficiently operate a computer keyboard and programs.

Minimum Qualifications:

***Education*:**

High school diploma or equivalent (GED).

***Experience*:**

Over one through three years experience with high volume/upscale catering food preparation and garniture encompassing items listed in duty #1; must pass BSU food handler's physical examination.

Additional Preferred Qualifications:

Education:

Experience:

No allergies to soaps, cleaning agents, chemicals, or other materials or environmental factors in food service, e.g.; steam, dust, etc.; must have clean body, teeth, hair, nails, and clothing; must be able to read and comprehend all specified policies and procedures for safety, hazardous materials information, and University policies, procedures and communications, and perform mathematical calculations; must be able to perform all physical and mental requirements outlined in each job duty/responsibility; over four years experience with high volume/upscale catering food preparation and garniture encompassing items listed in duty #1; prior proficiency in cake decorating; demonstrated proficiency with food carving using cheese, ice, chocolate, vegetables, fruit, and tallow; advanced culinary training or successful completion of BSU Meat and Vegetable/Pastry Cook School.

MEMORANDUM FROM ANN TALLEY
TO NORM BECK
Dkt. No. 75-26

* * *

BUSINESS AFFAIRS
Muncie, Indiana 47306-0760
RESIDENCE HALLS DINING SERVICE
Phone: 765-285-1967

MEMORANDUM

TO: Norm Beck, Associate Vice President
University Human Resource Services &
Auxiliary Services

FROM: Ann Talley, Director
Residence Halls
Dining Service & UBC

DATE: December 19, 2001

SUBJECT: Termination Recommendation

I recommend the termination of Chef Lou Rice's employment effective Thursday, January 3, 2001, for inappropriate behavior and poor professional judgement.

Approved 12/20/01, Norm Beck

INVESTIGATION OF COMPLAINT AGAINST LOU RICE FOR INAPPOPRIATE REFERENCE TO HIS GENERAL MANAGER, BILL KIMES, WHO IS GAY

INFORMAL COMPLAINT RECEIVED BY THE OFFICE OF AFFIRMATIVE ACTION AS REPORTED TO ANN TALLEY BY SALI FALLING

COMPLAINT: Someone lodged an informal complaint regarding Chef Lou Rice, University Banquet and Catering, and his use of terms such as fag, fruit and queer in reference to Bill Kimes. The individual did not want to sign a formal complaint and wished to remain anonymous. Sali Falling asked that we look into this allegation.

INTERVIEW OF DON KNOX (UBC Stock Clerk/Custodian who reports to Chef Rice)
--He has never heard Chef Rice use inappropriate terms or slang terms for gays nor in specific reference to Bill Kimes.

INTERVIEW OF BRAD HUTSON (UBC Kitchen employee)
--yes, he has heard Chef Rice say "fruit"and "fag" in reference to Bill Kimes
--heard it most recently at an E.B. Ball event when Bill Kimes was on vacation [week following Thanksgiving holiday].
--Saundra Davis, Wes Nyenhufs, Ben Schroeder, and Trisha Ellis also heard it.

INTERVIEW OF MAETTA VANCE (UBC Kitchen employee)

--yes, Chef Rice has referred to Bill as a "faggot".
--he used the term "frequently for a while".

INTERVIEW OF RIKEE CRAWMER (UBC Dish-room/Kitchen employee)
--no, has heard no name calling.

INTERVIEW OF BETTY SKINNER (UBC Catering Specialist-works in kitchen)
--no, has heard no name calling but has heard em-ployees gossiping about Chef having said it.

INTERVIEW of LISA FORDYCE (UBC Sales and Service Supervisor)
--in the first interview: has not personally heard it but had heard employees gossiping about it. [I may have asked the question if she had witnessed such language being used by Chef Rice as he talked with employees and specifically at the E.B. Ball Center event during Bill Kimes' vacation.]

--in a second interview on December 14, 2001 Lisa said she has heard Chef Rice use inappropriate terms to refer to gays but has not witnessed other employees being present. She has heard Bill Kimes refer to himself as a "fruit".

INTERVIEW OF WES NYENHUFS (Substitute)
--heard Chef Rice make the statement "For once I am not working with any fags" [in reference to the E.B. Ball Center event during the vacation absence of Bill Kimes the week following Thanksgiving 2001]. He feels "everyone knew" the reference was directed to-wards Bill Kimes.

INTERVIEW OF SAUNDRA DAVIS (full time Catering Specialist)
--did not hear Chef Rice say the statement "For once I am not working with any fags" nor has she heard any references made using the slang terms.
--did hear Chef Rice say, at this same catered event, that he "liked lesbians".

BEN SCHROEDER (Student Employee, phone 288-7926)
--has not been reached for comment on this issue

INTERVIEW OF BILL KIMES (General Manager of UBC)
--phone. interview: Bill says he has never used the aforementioned slang terms to describe himself.
--in a later conversation he said he may have used the term "fruit" but it is not commonplace to use the term.
--on December 18 when questioned about whether he has tolerated the use of inappropriate slang terms or sexual content in employee conversations he replied, "No".

BALL STATE UNIVERSITY
INTERNAL INVESTIGATION FORM
(September 23, 2005)
Dkt. No. 59-2

* * *

*****CONFIDENTIAL*****
INTERNAL DOCUMENTATION FORM
DISTRIBUTION LIMITED -SEE BELOW

* * *

Unit: **Univ. Banquet Catering**
Date: **September 23, 2005**
Time: **approx. 11:15 AM**

Preparer: **William Kimes**
Title: **GM - UBC/CC**

Purpose of Documentation:
Investigation documentation

If other explain:

Type of Occurrence: **Confrontation**

Occurrence Dates: **September 23, 2005**
Times: **approx. 6:20 AM**

Occurrence Location:

Student Center elevator- by kitchen

Person(s) Involved/Job Title(s): **Saundra Davis - Catering Specialist and Maetta Vance – PT Catering Assistant**

Witness(es)/Job Title(s): **none**

Witness(es) statement(s) (dated and signed) attached: Yes ☐ No ☑

Recommended Follow-up:

Recommended Action:

Discipline Recommended:
Yes ☐ No ☐

Previous Discipline for the Same Rule:

Distribution: Unit Manager ☑ Ann Talley ☑
Karen Adkins ☑ Liz VanMatre ☑
Home Unit ☐ Employee Relations ☐

* * *

At approx. 7:00 am Saundra Davis approached David Ring at the alumni center crying and explained that there was a confrontation between herself and Maetta Vance on the kitchen elevator at the student center. Listed below are notes from meetings with Saundra Davis, Maetta Vance and Betty Skin-

ner (both employees had named Betty as someone they shared information with)

Meeting with Saundra Davis - September 23, 2005 approx. 11:15am present Saundra Davis, Connie McVicker (employee representative), Amy Grasso(supervisor representative) and Bill Kimes (GM - UBC/CC)

Bill Kimes: I understand there was an incident this morning. Will you tell me what happened?

Saundra Davis: I came in at 6am and saw Amy Grasso at 6:15am and she explained that I needed to go to the Alumni Center. I took the van key from the second floor and got on the elevator to go to the first floor. Instead of going to first the elevator went to third. Maetta got on the elevator with a cart. I said "Good Morning, how are you". I hit the second floor button thinking Maetta was going to second floor. (Saundra explained that Maetta was staring at her as if looks could kill) The second floor door opened and Maetta said "Move Bitch." Saundra said "I'm going to first", Maetta said "I'm going to the basement". The doors closed and Saundra stated " there is no reason to call me a bitch." Maetta said" You are an Evil Fucking bitch." Saundra said "God loves you." Maetta said "He does?" Saundra said that the doors opened and as she was leaving the elevator she said "and he loves me too."

At approx. 6:25am Saundra told Amy Grasso what happened - told Dave Ring at the Alumni Center and

when she returned from the Alumni, she mentioned what happened to Betty Skinner.
Saundra said "I am not afraid of her, I am not fearful for my life." I am afraid of the confrontation and the looks." "I am asking her to be civil to me."

Meeting with Maetta Vance - September 23, 2005, approx. 1:30pm present: Maetta, Sheila Jett (employee representative), Amy Grasso(supvr. representative), Bill Kimes (GM-UBC/CC)

Bill: "I understand there was a situation with Saundra Davis this morning, Can you tell me what happened?"

Maetta: at 6am I got on the elevator to go to third. Saundra was on there and she started to talk and laugh. She kept talking and laughing.
Bill: "What did she say?"

Maetta: "moment of silence"

Maetta: Saundra said "When are you going to stop this?" "I'll do it again"

Maetta: the look Saundra gave me and the statement made me fearful.

Maetta: the doors opened and I got off on third floor.

Maetta: When Betty came in, I told her what happened.

Betty said "You should have had a tape recorder." Why it was said, I don't know.

Bill: Maetta, while you were on the elevator with Saundra, at any time did you say the words "Move Bitch"?

Maetta: "I didn't say anything, I was by the door"

Bill: Maetta, while you were on the elevator with Saundra, did you say the words "Move, you Evil Fucking bitch"?

Maetta: No I didn't, it was a short ride.
*

Meeting with Betty Skinner - September 23, 2005 - approx 2:30pm present: Betty Skinner (she chose not to have representation), Amy Grasso(supvr representative), Bill Kimes(GM- UBC/CC)

Bill: I was told by Maetta and Saundra that they talked to you about the incident this morning. Will you tell me what happened?

Betty: Maetta hit me up as soon as I walked in the door - she said that Saundra and her got into it. Maetta said "she was fearing for her life."

Betty said "It's your word against hers." Maetta said "I'll handle/take care of this." This makes me fearful for my life."

Betty said that Maetta then slammed a pan down, which happens a lot.

Betty: Maetta cornered everyone in the kitchen and told them what happened - I think she wanted them to be on her side - Saundra has not discussed the situation with anyone.

Betty: Saundra came back after she was at the alumni center and said "I need to talk to you a minute." we went away.
Betty said Saundra stated she was on the elevator - Maetta got on. Saundra said "Good morning. Maetta called her a "Bitch". Saundra said "God loves you too." "Loves you and me too." Maetta said the "F" word
Betty said "too bad you didn't have a tape recorder."

NAACP COMPLAINT FORM
Dkt. Nos. 59-8 & 59-9

National Association for the Advancement of Colored People

Complaint Form

Name: Maetta Vance
Address: [redacted]
Phone: [redacted]

Name/Contact Information of Witnesses

Date of Incident:
This has been going on for over 6 yrs. Jan-05 – 09-23
And from 6-05 – 9-05

Place of Incident:
Ball State Catering Dep.

Details of Incident – be specific!
(Attach additional paper if needed). What do you want the NAACP to do?

First I don't Believe Bill Kimes the Manager of UBC where I'm employed Ever wanted me there from the day he laid eyes on me he greeted me by saying why don't I find something else to do meaning another Job. Out of the Blue Another incident happened. He asked me in Cardinal Kitchen Part of Catering what's the matter you don't like us people in front of

a supervisor and other people. I responded yes I do, with a puzzled look I felt very uncomfortable around him. Time passed and another incident occurred. Saundra Davis, An Employee at UBC hit me and I reported to Bill. She admitted that she did it to Everyone. Amy Geesman, Betty Skinner, Bill Kimes, Lou Rice, Phyllis Hallinger, Karen Adkins, Bill and Karen called me into the office. Bill wanted me to demonstrate how she did it and I did. I thought what difference did that make she violated me by touching me and I didn't like it. And to top it off Karen Adkins the Asst. director of personnel was there and asked me what I wanted her to do about it. I asked her what would happen If It would have been the other way around. Nothing was said back to that question. Then she said I wouldn't know her punishment which was nothing. Betty Skinner told me the next day that if I talked about that incident I would be sent home while Saundra Davis the woman that violated me yelled out loud saying if she was fired I was going to. I filed a complaint with Affirmative Ac. and got nowhere with Sally Fallings.

I went downtown in Muncie to talk to someone in the Civil Rights Angela Gordan. She took my complaint unfortunately it was to late to pursue just like I know you can't do anything about it now. I realize this but I am bringing it back up because from then to now I have always felt like the outcast. He Bill Kimes my manager has never let me feel welcomed. She Saundra Davis bid out and came back as a supervisor only to start the intimidation again. Betty Skinner the other supervisor came to me and put her arms around me and said that she wanted to be the

first one to tell me that Saundra was coming back and she smiled Just like that and walked away. You know, if these people were at all fair I would or could have gotten at least an apology back then instead they, I felt were bent on trying to make me leave, like so many others had done. But I love what I do in catering and have never caused any trouble in 16 yrs of service. Never even had a write up until this yr. when I was off for knee surgery and returned on one occasion May 17th. While still on workmans comp. I had an allergic reaction to some medicine Dr. Combs prescribed me and was ill. I called in and Bill said I needed to go to the emergency room in order to be excused. I didn't have $250.00 to pay for the services but my Dr. who was attend later excused me. But I think it is still in my file. Saundra Davis and I don't even speak.

* * *

In August of 2005 my fellow co-workers, one by one at different times started telling me about another employee that works there named Connie McVicker not liking Niggas is how it was put I brushed it off at first but the more people said it the more it started to bother me exspecially when I noticed Connie start to follow me around work peeking around corners I caught her doing it on several occasions I started to feel uneasy about it Julie Murphy told me first she stated that she Connie McVicker was really a rascist then Jim Hiday a co-worker told me she would tell him that in the truck she made him feel uncomfortable by her using the N word as he put it then Julie Murphy told Donn Knox a ex-employee now but he

was still employed there at the time of Connie Boldly saying the N word.

Amy Geesman co-worker was about in tears telling me that Connie told her the same thing and also added that Connie told her that she had relatives in the KKK. I didn't want to hear any more at tht point I was beginning to get paranoid exspecially when Connie would look at me and mumble words under her breath and stare and continue to follow me on my breaks. At times looking hateful & scary.

On Friday 9-23-05 I had an issue with Saundra Davis at 6:00 am (On the elevator. She was already on it.) I got on 2nd floor while my biscuit s were baking to gather for brownies to make for the day she was by the buttons to the floors the door shut out of the blue she said when are you gonna stop this. I'll do it again first thing came to my mind was her hitting me as she did in the pass I got kind of scared I must admit. I didn't say anything back to that response the elavator opened she got off on one floor I got off on another I waited to betty Skinner the supervisor got there and told her at 7:00 am she said that I should have had a tape recorder (why would I have a tape recorder I thought to myself.

* * *

Bill Kimes called me into the office at the end of my shift to talk to me He said that he had spoken to Saundra Davis that morning and she said that I called her an evil Bitch and said to her get out of the

way Bitch. I told him I didn't say that and proceeded to tell him what happened He took my statement I haven't heard anything about it to this day.

Monday Sept. 26 2005 I went to work clocked in first people I saw was Connie McVicker and Saundra Davis Connie Starring looking mean & Saundra whistling and smiling at that point I felt like I couldn't breath I started crying and shaking I was scared and just a mess. I went down to one of the supervisors offices Dave and asked him to please go get Bill I needed to go home Bill was talking to Ann Talley the Director of RHDS. He said so I waited he didn't show. Dave went to tell him again he finallay came and started asking me a lot of questions what's wrong I told him that I was feeling funny and numb, I couldn't catch my breath I started to tell him about Connie Saundra & the way I feeling about everything. I couldn't take it any more I needed to go right then. I just felt that if I could just get outside I would be safe. Bill told me that I had 40 hrs. unchallenged that I could leave. I had to go to the Dr. because of the shaking and chest pains Dr C. Westmoreland she put me on Lexapro & Ativan and took me off of work until the Oct. 14th for further evaluation after examining me.

I feel that I have to constantly work in a hostile environment. My rights have been violated. My dignity as a black woman and individual has been stripped I'm in constant fear for my safety I don't know when or who's gonna attempt another act or incident verbally or physically I'm afraid to be at work I would

like for the NAACP to seek investigate & Help Me Please.

Maetta Vance

Signature: /s/
Date: 10-06-05

NAACP Muncie Branch
PO Box 2901
Muncie IN 47308

BALL STATE UNIVERSITY
INTERNAL PRE-DISCIPLINE FACT FINDING
Dkt. Nos. 59-13 & 59-14

* * *

Unit: **Univ. Banquet Catering**
Date: **September 26, 2005**
Time: **approx. 8:30 AM**

Preparer: **William Kimes**
Title: **GM - UBC/CC**

Purpose of Documentation:
Pre-discipline fact finding

If other explain:

Type of Occurrence: **Slander/**
Inappropriate Language

Occurrence Dates: **September 26, 2005**
Time(s): **approx. 8 AM**

Occurrence Location:
UBC – Student Center

Person(s) Involved/Job Title(s): **Maetta Vance – PT Catering Assistant; Connie McVicker – FT Truck Driver**

Witness(es)/Job Title(s): **Jim Hiday-PT Lead Set-up; Amy Geesaman-PT Catering Assistant; Maria Julius-PT Catering Assistant; Brad Hutson-PT Catering Assistant; Julia Muphy-FT FSW**

Witness(es) statement(s) (dated and signed) attached: Yes ☐ No ☑

Recommended Follow-up:

Recommended Action:

Discipline Recommended:
Yes ☐ No ☐

Previous Discipline for the Same Rule:

Distribution: Unit Manager ☑ Ann Talley ☑
Karen Adkins ☑ Liz VanMatre ☑
Home Unit ☐ Employee Relations ☑

* * *

Notes: On September 26, 2005 Maetta Vance (PT catering assistant) reported to Dave Ring (Catering Sales/Service Supervisor) at approx. 8:15am that she was upset and needed to go home. She was shaking

violently. Dave was able to inform Bill Kimes (GM-UBC/CC) at approx. 8:30am. I met with Maetta Vance in Dave's office. Dave Ring was present as well as Sheila Jett (employee representative). I asked Maetta what was going on and she responded very cryptically that she "Backflashed from Friday" and that other employees were telling her that Connie McVicker (FT UBC Truck Driver) was calling her names behind her back. Maetta alleges that Connie called her "Nigger" and mentioned that Connie had family members in the "Klan" and that she was out to get her. Maetta mentioned the other employees who told her this were Julia Murphy (FT – FSW) and Amy Geesaman (PT-Catering Assistant). The conversation was brief because Maetta Vance kept asking to go home and kept saying she couldn't work like this. Maetta sat on the edge of her seat and was shaking violently. She appeared to be in hysterics. Maetta left the building approx. 8:35-8:40am. Maetta returned to the building approx. 1:30pm with Medical Certification taking her off work until October 14, 2005.

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Monday September 26, 2005 – Meeting with Amy Geesaman (PT – Catering Assistant)
Present: Amy Geesaman (Amy declined employee representation); Bill Kimes-GM UBC/CC; Lisa Fordyce-Supervisor (Mgt. representative)

Amy: I know what this is about.
Bill: Can you tell me what happened?

AG: Maetta was crying and wanted Bill. I told her you were downstairs and to go to Lisa or Dave.
BK: Have you ever heard Connie McVicker use in the presence of employees in the student center the term "nigger"
AG: Yes, it's been about 4 or 5 months ago, awhile back. Connie has told people "that nigger over there" and pointed to the bakery area.
BK: You said she's told people. What people are you referring to?
AG: I know she's said that in front of Brad and Maria and Julie.
BK: Has Connie ever talked or mentioned that she had family in the "Klan"?
AG: Yeah – Maetta called me on Saturday night (9-24-05) and she was just talking in general. Maetta asked me if it was true that Connie had called her a "nigger"? I told her the truth. She asked me why I never told her this. I told her that I was hoping it would all go away.

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Wednesday September 28, 2005 – approx. 3:40pm
Meeting with Julia Murphy
Present: Julia Murphy – FT FSW (Julia chose to not have representation); Bill Kimes – GM UBC/CC; Lisa Fordyce-Supervisor, MGT representative

Bill: I'll just get to the point. Has Connie McVicker ever used the word "Nigger" in your presence or in front of any other Student Center employees that you've witnessed.

Julia: I can't say that she has said "Nigger". She makes rude comments about the black people. Rude comments or cut downs like with Maetta or anyone not white.
BK: Does she ever make rude comments towards anyone else? Donn?
JM: yeah
BK: Brad?
JM: No.
BK: Amy?
JM: No.
BK: Maria?
JM: Yeah – she says she messy
BK: Saundra?
JM: Yeah.
BK: Betty?
JM: No.
JM: Connie makes racial slurs toward Maetta – "She's black and she expects things her way".
BK: Have you ever heard Connie say that she hates black people?
JM: No- I can't say that. She has said that Maetta would not want to mess with the McVickers, because hse doesn't know who she is messing with. She proceeded to talk about having "Klan" in her family.
BK: How long ago did this happen?
JM: Maybe two or three months ago.
BK: Did this conversation happen out of the blue?
JM: It happened as a result of Maetta telling her she was just a truck driver. Connie told me she said it in front of everyone in the kitchen.
JM: Connie has a fit everytime she walks into the bakery with flour on the floor.

BK: Has Connie ever said that she was out to get Maetta.
JM: No, I've never heard that.

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September 28, 2005
Meeting with Brad Hutson
Present: Brad Hutson – PT Catering Assistant (Brad chose to not have representation); Bill Kimes- GM UBC/CC; Lisa Fordyce-Supervisor(MGT representative)

Bill: Have you ever heard Connie McVicker use the word "Nigger" in your presence?
Brad: Yes, quite awhile ago. Maybe 5 or 6 months ago. She said something like "that nigger in the bakery". I told her I did not like that word and she hasn't said it since.
BK: Have your ever heard of Connie saying "I hate black people"?
BH: No
BK: Has Connie ever told you or have you ever heard her tell anyone else that she has "Klan" members in her family?
BH: No
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* * *

Meeting with Maria Julius
Present: Maria Julius – PT Catering Assistant(Maria chose not to have representation); Bill Kimes –

GM UBC/CC; Lisa Fordyce – Supervisor(Mgt Represenative)

Bill: Has Connie McVicker ever used the word "Nigger" in your presence?
Maria: Yes and other words. Words that I haven't heard in a long time.
BK: What kind of words, and when did this happen?
MJ: It happened maybe one or two months ago. I don't remember the words, I just remember those words made me feel uncomfortable. There was a lot of contempt in her voice.
BK: At any time has Connie said in your presence that she hates black people?
MJ: No
BK: Has Connie ever mentioned to you or in your presence that she has "Klan" members in her family?
MJ: No

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September 28, 2005, 2:45pm
Meeting with Connie McVicker
Present: Connie McVicker-FT UBC Truck Driver/Custodian; Les Richardson - Employee Representative; Bill Kimes- GM UBC/CC; Lisa Fordyce – Supervisor,Mgt Represntative

Bill: At any time did you use the word "Nigger" in the presence of employees within UBC/Student center Dining?
Connie: No.

BK: At any time have you said that you "hate black people" in the presence of any employees?
CM: Heaven for Betsy, No.
BK: Have you ever talked to anyone about having "Klan" members in your family and that you were out to get anyone in particular?
CM: No I've never talked about being out to get anyone. One time on break we were outside talking about family history.
BK: When you say "We", who else was present?
CM: Some others in the kitchen.
BK: who in particular?
CM: People in the kitchen (Les interupted and explained to Connie that specific names were important)
BK: Go ahead you were saying that you were on break.
CM: We were talking about our family history. I said that my great grandfather was in the klan. My family history also has Native American, German and Jew.
CM: I don't care what color you are, you treat me fair, I'll treat you fair.
CM: I think comments were made because I sat in with Saundra on Friday.
CM: Maetta told me when I first started that it was my job to clean her ovens and mixers. She said I was a "white racist". She told Betty, Julie and Amy that.
BK: I do not have any other questions. Do you hve any other comments?
CM: No.

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October 20, 2005 – 1:30pm
Follow-up meeting with Maetta Vance
Present: Maetta Vance- PT Catering Assistant; Sheila Jett – employee representative; Bill Kimes- GM UBC/CC; Gloria Cartwright – University Compliance

Bill: I understand this may be difficult for you, but I wanted to come together so that I may get a statement from you. I know that on September 26th you were very upset.
Can you tell me again what happened on September 26th?
Maetta: I came into work about 8am, got ready for work. I had this overwhelming feeling from Friday when you called me into your office and asked me questions concerning the accusations. I was upset that she (Saundra) accused me when she threatened mea n Connie was running around and telling everyone "she hated niggers". I saw them both on Monday morning and couldn't take it. I felt my safety was in jeapordy. Connie kept looking at me and I kept thinking of that klan thing. I needed to go to the doctor because I was having anxiety attacks and I needed to calm down. I was having heart palpitations and chest pains and I needed to see the doctor. I felt violated. I was hearing it over the summer and from September.
Bill: Who was telling you this person was saying these things about you?
MV: Amy Geesaman, Jim Hiday and Julia Murphy since September and prior to that. Connie kept following me around the building and kept giving me an

uneasy feeling. She hated me. What did I do for her to hate me? I am a cook and she's a truck driver.
Gloria: How did these people come to tell you that another person was saying such aweful things about you? How does that conversation go?
MV: They would come up and not make eye contact and say things like "you need to know that Connie is really prejudiced". Jim would say that Connie would say "nigger" in the truck and curse at students as they would walk in front of the truck. Julie would say that "Connie didn't like niggers".
Gloria: Did you ever go up to her and tell her you didn't like her saying these things?
MV: No, I don't have any contact with Connie. I get looks from her like she's "mean mugging" me. I don't hate people just because of the color of their skin.

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October 28, 2005
Interview with Jim Hiday
Present: Jim Hiday-PT Lead Setup (declined employee representaton); Lisa Fordyce-Supervisor; Bill Kimes-GM UBC/CC

Bill: Your Name was mentioned as a possible witness in an employee investigation. I need to ask you some questions.
Bill: Did you ever discusss with Maetta about Connie talking about her?
Jim: Yes
Bill: About how long ago was this?
Jim: About 3 or 4 weeks ago. She had heard that Connie was talking about her. Connie's to smart to

say anything about Maetta in front of me because she knows we're friends.
Bill: Has Connie ever used the word "nigger" in reference to African Americans in front of you?
Jim: (shook his head) Yes- in reference to people on the street.
Bill: She has never said the word "nigger" in relation to Maetta?
Jim: Not in front of me. She knows I would tell Maetta.
Jim: She's never said that, but she has made statements that make it pretty obvious that she dislikes Maetta.
Bill: What kind of comments?
Jim: I don't really remember.
Bill: You said that she makes comments that makes it sound like she dislikes Maetta. Has she ever said why she dislikes her?
Jim: Not really. She doesn't think that Maetta does very much work.
Bill: Thanks. Is there anything else that you can think of?
Jim: No

BALL STATE UNIVERSITY
COMPLAINT OF
UNLAWFUL DISCRIMINATION
Dkt. No. 59-1

COMPLAINT OF UNLAWFUL DISCRIMINATION

Ball State University Phone: 765-285-5162
Office of University Compliance TDD: 765-285-2639
Fax: 765-285-6605

Name: Maetta Vance TelephoneTDD: [redacted]
Address: [redacted]
Check One: ___ Student
_x_ Employee – If employee, list:
Department: Banquet & Catering
Immediate Supervisor: Bill Kimes

Procedures: This form must be completed and filed with the Office of University Compliance within 45 calendar days after an alleged discriminatory act(s) has occurred. To insure a full investigation, it should be completed as accurately as possible. As part of the investigation process, you may be interviewed by the Office of University Compliance. This completed form should be marked confidential and forwarded to the Office of University Compliance, Ball State University, Muncie, IN 47306.

Basis of Complaint:

☑ Race ☐ Sex/Gender
☐ Sex/Sexual Harassment
☐Disability ☐ Age
☐ Religion ☐National Origin
☑ Other threats & violation

Subject of Complaint:

☐ Pay/Benefits ☐ Promotion/Transfer
☐ Discipline ☐ Job Assignment
☐ Other _____

Names(s) of the individual(s) who engaged in the alleged unlawful discrimination and position(s) held:

Saundra Davis Kitchen Supervisor
Connie McVicker Truck Driver

Description of the alleged discriminatory act(s) and other relevant information : * * *

On 9-23-05 Saundra Davis threatened me on the elevator to do it again saying when was this gonna stop. She and I haven't spoken to each other in over 6 years. Because I was violated by her at work when she hit me on the job in the kitchen where we both worked. I reported it to my boss Bill Kimes and was also taken into his office when he and Karen Adkins were both aware of the incident. Karen Adkins stated "what she wanted me to do about it." William Kimes stated that she wanted me to demonstrate how she hit me. They both said they weren't obligat-

ed to let me know her punishment. She was at work the next day I was told by Betty Skinner. If I poke fun of the incident I was to be sent home. From that point on I felt violated and was picked on constantly but I took it on (9-23-05). When she threatened me on the elevator then when Bill told me there were no witnesses. It's like it started all over again. On 9-26-05 when I arrived at work I had a physical and mental meltdown. It felt like I couldn't breathe when I saw Saundra Davis & Connie McVickers. Connie throughout the summer had been making statements to employees how she hated niggers and mumbling to me words I did not understand when she passed by me and saying to employees how she has relatives in the KKK. I can't take this anymore.

Are there any documents relevant to your complaint?

☑ Yes ☐ No If yes, please list the documents:

I have witnesses and dates of the occurrences.

Names and addresses of any witnesses and positions held:

Amy Geesman, Kitchen Helper; Jim Hiday, Waiter; Julie Murphy, Pots & Pans UBC, (Donn Knox, no longer an employee at UBC) UBC Workers

Desired Resolution:

This has been going on so long and is continuing to go on. Since Bill Kimes and others has been there (UBC) so they are fully aware of what my feelings are. I think he has allowed it to escalate to the point of me being paranoid and feeling that I'm in danger of looking over my shoulders. I feel stripped of my dignity as an individual having to live with this over my head is hard. I don't know how it can be resolved.

/s/ 10-20-05

Complainant's Signature Date

Maetta Vance
Printed Name

"NOTE TO FILE"
GLORIA J. COURTRIGHT
BSU OFFICE OF COMPLIANCE
Dkt. No. 75-19

NOTE TO FILE:

Date: October 20, 2005

Present: Maetta Vance, Bill Kimes, UBC Director and direct supervisor of Vance, Sheila Jett,

Student Center custodial group leader and witness for Vance, Gloria Courtright

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Bill Kimes began the meeting by informing Vance that he wanted to give her another chance to report on the incident of Monday 9/26/05. BK reminder MV that she had come to him with the matter but was hysterical and making no sense, so he just sent her home; subsequently MV has been out of work on a reoccurring worker's comp injury to her knee and this is the first chance to hold this meeting. BK asked MV to tell him again what happened.

MV said she arrived at work about 7:55am, still upset from the incident in the elevator on Friday. MV said she saw Connie McVicker and Saundra Davis standing together and "a feeling just swept over me and I felt like I needed to get away." MV said that it

isn't right that she has to feel fear while at work. She went to tell BK but was so upset and fearful that she wasn't making any sense, so she left work. MV said she went to her doctor that Monday because she had chest pains and wanted someone to talk to about what's happening, MV said she felt violated.

GJC asked MV how long this situation has existed and she replied McV had made racist comments off and on throughout the summer, and specifically in Sept. GJC asked if other employees were aware of these comments and MV replied McV had said things in front of Julie Murphy, Amy Geisman, and Jim Heiday. MV said McV began to follow her around the building and looking at me" all the time so that it upset her. When asked if MV has any idea why McV suddenly started this behavior, MV replied that she has no idea why McV hates her. GJC inquired if McV ever make these comments to MV directly, and she replied that McV does NOT say things to her face. MV said it was important for GJC to know that "Connie McVicker is extremely prejudice" and Julie says when McV even sees black people in the street, she refers to them as 'niggers." GJC asked MV if she had ever gone directly to McV to discuss the matters between them, and MV said no.

GJC asked MV if she ever went to Bill Kimes with her concerns and reminded her that management can't do anything about problems between employees when they aren't informed. MV said she doesn't go to BK because she feels like she "doesn't fit in. . .it's them and there's me." MV said she is the only African-American in UBC and feels like she's all alone.

MV stated that she understands if she had gone to BK early on, he may have done something and she appreciates this chance to be heard and feels like a load is lifter off her shoulders.

BK then told MV that the other reason he wanted to speak with her was related also to the incident in the elevator (see IDF in files). BK informed MV that because the 2 parties report such different versions of the incident and because there were no witnesses, he has been directed to counsel MV. BK then stated to MV that she has a responsibility to act like an adult and to treat others with the same sort of respect you expect for yourself. Further, BK said that and accusation has been made that inappropriate language was used and MV is reminded that foul language is not permitted in the workplace. MV asked K if this "talking to" was about Saundra, and reminded BK that she and SD don't even speak and said she didn't do anything to Davis! BK replied that he was not accusing MV or doing anything and restated that eh was offering counsel to her regarding using inappropriate language at work. MV became agitated and was shaking and crying. She said that SD is now in a place as lead at work to do things to MV and get away with it. MV stated to BK that she "has not forgotten what happened years ago and you guys did nothing." MV asked BK if he was saying the same thing to SD and he said he was, and that he was not at liberty to discuss comments made by SD, while reassuring MV that he was, and that he was not at liberty to discuss comments made by SD, while reassuring MV that her comments would not be repeated. MV said it's a joke to say inappropriate language is

not tolerated because it goes on all the time and you don't do anything.

GJC pointed out to MV that she did not hear BK accuse MV of anything, he was delivering the only kind of reprimand that occurs when the stories are so different and there are no witnesses. GJC informed MV that, like it or not, the policies in place to deal with personnel matters need to be handled via the chain of command. GJC informed MV that she knows the UC office did send complaint forms to MV's home address, but encouraged her not to file a formal allegation without allowing supervision to attempt to solve the matter.

After the meeting was concluded and MV and Jett left the room, BK and GJC sat at the table for a few minutes. GJC remarked how shaken MV seemed to be, and BK replied that he did notice but he believes MV had her fists clinched because her fingernails are too long and she didn't want him to notice. BK replied that he will continue to investigate the matter and now ill also have to speak with Jim Heiday. . .this was the first mention of him as a possible witness. BK said this in on-going between Vance, Davis and McVicker and he doesn't know the answer. GJC suggested that BK may have to micro-manage the environment for a while to see for himself what happens, and ultimately, this seems to be a matter for management to handle. BK reminded GJC that he is also the chef and has a lot more work to do than just watching employees, and that he will continue to investigate and report via proper channels.

"PHONE LOG" CALL FROM
GLORIA J. COURTRIGHT TO BILL KIMES
Dkt. No. 75-17

Phone Log

Date	**Call from:**	☐ **Stopped by**
10/24/2005	GJC	
Time	**Call to:**	☐ **Check when**
12:33pm	Bill Kimes	**printed**
Dept:	**Phone Number:**	
UBC		

Sort by Information:

Last Name:	**First Name:**
Vance	Maetta

Short Reason/Topic:
Inquire about investigation:
Message:
GJC asked Kimes if he had done anything regarding Vance and what she reported to us last week. BK said he was out Friday and today has begun training a new employee. BK said he has scheduled a meeting with Jim Hiday to see what he knows and that he has prepared notes from our meeting and sent an IDF to Adkins and Talley.

GJC informed BK of the calls from Vance, including the one from this morning. GJC told BK that she did not speak with MV, but MV left a detailed message with Katie Skinner. MV reported BK told her to get to work and he didn't tell anyone else that. ... BK replied that she was the only one talking, except the new guy who wasn't even on the clock yet. BK

said the new employee is African-American and he is concerned that MV will attempt to create an alliance with him. GJC told BK that she would contact MC and simply report that management is continuing to look at the matter. He said OK and to call him back if more information is needed.

"PHONE LOG" CALL FROM
MAETTA VANCE TO GLORIA J. COURTRIGHT
Dkt. No. 75-17

Phone Log

Date	**Call from:**	☐ **Stopped by**
10/24/2005	Maetta Vance	
Time	**Call to:**	☐ **Check when printed**
4:25pm	GJC	
Dept:	**Phone Number:**	
UBC	[redacted]	

Sort by Information:

Last Name:	**First Name:**
Vance	Maetta

Short Reason/Topic:
Gjc to mv let bsu processes work

Message:
GJC phoned Vance left vm with message saying "I have checked further and am convinced that management in your area is looking into the matter and is continuing to interview other employees who have have something to offered. I encourage you to let management look into this and allow the process to work. I believe this is more a departmental personnel matter than it is a matter of compliance. Thank you and I'll talk to you again if need be."

Vance called right back saying she was on another call. MV asked GJC if she intends to have her at any more meetings because she now wants a representative with her. GJC asked what sort of repre-

sentative was she talking about, and she replied the NAACP. She said she intend to tell Bill Kimes that tomorrow and wants GJC to know in advance. MV said the "torturing continues" while I wait for management, but I understand there are policies and will wait as long as I can. MV also said she believes that BK has already started to retaliate against her for the other meeting and she thinks it will get worse. GJC restated that a place as large as Ball State has to have policies to address certain situations and personnel matters are among those issues. MV said she appreciated that I had listened to her and that she will continue to "do her job" and not do/say anything to anyone.

GLORIA COURTRIGHT LETTER
TO MAETTA VANCE (October 26, 2005)
Dkt. No. 58-14

* * *

OFFICE OF THE PRESIDENT
OFFICE OF UNIVERSITY COMPLIANCE

October 26, 2005

Mrs. Maetta Vance
[address redacted]

Dear Mrs. Vance:

Thank you for meeting with me and your supervisor, Mr. Bill Kimes, on Thursday, October 20, 2005. In that meeting you explained your concerns regarding what you believe to be inappropriate comments and conduct on the part of two of your co-workers; and you clarified that you believe these comments and conduct are racially motivated. At the conclusion of our meeting, Mr. Kimes indicated to you that he was currently investigating your concerns and would continue to do so. As you may also recall, I encouraged you to give Mr. Kimes time to continue his process of review so that this matter can be properly resolved.

In light of our meeting, our phone conversation later that same day, as well as your phone calls since that time, I thought it might be helpful for me to clarify

for you the status of your concerns and the university's response to those concerns.

As you indicated in our meeting, the first time you made Mr. Kimes aware of your belief that one of your co-workers was using racially inappropriate language was on September 26, 2005. As soon as Mr. Kimes was made aware of your concerns he began his investigation and took steps to look into the matter even that day. As you know you then returned to work on October 19, 2005, and Mr. Kimes and I met with you the next day to discuss further the concerns you mentioned on September 26, 2005, as well as to address the incident that occurred on September 23, 2005. I outline all of this to emphasize that your concerns have been taken seriously and are currently under investigation. In fact, I have spoken with Mr. Kimes as recently as today, and he continues to pursue a resolution to the situation.

Maetta, I can appreciate your frustration that the process of investigation is not moving as fast as you would desire; however, every effort is being made to reach a determination based on the information provided, and you can be assured that Mr. Kimes will continue to review this matter and keep me up to date.

To that end, I would encourage you to communicate directly with Mr. Kimes any information you might have regarding this matter. I will continue to coordinate with Mr. Kimes and I assure you we will work toward an appropriate resolution.

Sincerely,

/s/

Gloria Courtright
Associate Director, University Compliance

cc: Mr. William Kimes, General Manager,
University Banquet and Catering

Muncie, Indiana 47306-0020 • Phone: 765-285-5162 Fax: 765-285-6605 • TDD: 765-285-2639

"PHONE LOG" CALL FROM MELISSA RUBRECHT TO GLORIA J. COURTRIGHT
Dkt. No. 75-17

Phone Log

Date	**Call from:**	☐ **Stopped by**
11/7/2005	Melissa Rubrecht	
Time	**Call to:**	☐ **Check when printed**
11:00am	GJC	

Dept: Employee Relations

Phone Number: 5-1823

Sort by Information:

Last Name: Vance

First Name: Maetta

Short Reason/Topic:
MR to GJC re BKimes visited by Urban League

Message:
Melissa Informed GJC that she had just received a phone call from Bill Kimes. Kimes told MR that a man named Clark visited him asking about hosting a dinner, prices on various items, etc and then said "does Maetta Vance work here?" Kimes states that he told the man yes, she does work here and when Kimes asked the man who he was with, he stated "the Urban League." Kimes states the man didn't leave a business card with any contact information. Clark then said that Maetta had called his office earlier and he was just wondering if this was where she works. Kimes again replied she does and gets off work at 1:30. Clark said he would contact her later.

Kimes wanted to report this incident to Melissa and told her to let GJC know of this development. MR asked GJC is she knew much about the Urban League, and GJC replied that she knows it is an African-American advocacy group..

E-MAIL FROM ANN TALLEY
TO WILLIAM J. KIMES
Dkt. No. 75-18

Talley, Ann Louise

From: Talley, Ann Louise
Sent: Friday, November 11, 2005 11:25 AM
To: Kimes, Willlam J.
Cc: Adkins, Karen J.; Poore, Elizabeth Ann; Rubrecht, Melissa S.; Kramer, Gary G.; Talley, Ann Louise; LEWIS, JON J.
Subject: McVicker/Vance Case

Bob Cope has prepared a written warning to be issued to McVicker for Rule #27. Please come by and pick it up then issue it to McVicker today at the end of her work shift.

Bill, you are to advise McVicker verbally that the "n" word remarks which have been attributed to her by several witnesses and her own admission (intimidating others) to family Klan association plus looking intently or glaring at others (Vance) are very serious matters and are totally unacceptable behaviors. Should she do these things in the future she can expect discipline and it may be dismissal under the sexual harassment regulations. (Per Melissa Rubrecht and in conjunction with Sali Falling).

I will caution you not to discuss the discipline out-

side of the office. It might be tempting to tell Vance of the discipline to let her recognize her "victory over injustice" but it just isn't a good practice. You will need to ask other supervisors to be on the alert for McVicker behaviors in the future to ensure she doesn't retaliate to anyone she may think served as a witness or to Vance who complained. If there is any repeat of the behaviors you must act immediately. You may need to ask Skinner to keep her ears open as well since she spends more time in the kitchen area than the sales and service supervisors. Next time we will need dates, times and witnesses so stay sharp.

BALL STATE UNIVERSITY
WRITTEN WARNING REPORT
Dkt. No. 75-8

Ball State University
Service Personnel
Written Warning Report

Date: November 11, 2005

To: Connie McVicker
Title: UBC Stock/Truck Driver

REASON FOR WARNING:

You have been Issued this written warning for violation of University rule or regulation number 27 which reads as follows: "Any other conduct which is inconsistent with proper behavior"

The violation occurred on non-specified dates over a period of 1-6 months at University Banquet and Catering and in the UBC truck.

FACTS RELATED TO THE VIOLATION:

Several witnesses attested to your use of the word "N*****" in verbal reference to African-American students and co-worker; your verbal reference to family association with the Ku Klux Klan; and glaring, looking intently, or staring for prolonged periods

at co-workers, all of which are unacceptable behaviors.

PREVIOUS ACTIONS TAKEN:

Not applicable.

SUPERVISOR'S RECOMMENDATION:

Immediately cease unacceptable behaviors.

Future violations of University rules or regulations will result in further disciplinary action.

/s/
William Kimes, General Manager
University Banquet and Catering

Distribution: Original – Employee
1 copy – Employee Relations
1 copy – Supervisor
1 copy – Employee File

NOTE TO FILE, GLORIA J. COURTRIGHT
Dkt. No. 59-19

NOTE TO FILE

DATE: 11/14/05

RE: B Kimes w/ Vance re comments made by McVicker

Present: Kimes, Vance, Butch Parker as employee rep, Gloria Courtright

---

Bill Kimes and Ann Talley were reminded by Sali Falling that because Maetta Vance has alleged discrimination in the workplace, all meetings they have with her on this matter need to include Gloria Courtright.

BK asked Maetta to meet with him regarding her complaint of the most recent comments made by Connie McVicker. BK began the meeting by informing MV that he had interviewed Betty Skinner because MV stated BS had heard CV refer to MV as a monkey. MV affirmed that was the case, but added that she didn't mean to say BS was talking with CM when it happened. BK informed MV that in his interview with BS she denied hearing such comment MV replied "that doesn't surprise me." BK informed MV that with no witness to the event, proceeding

further would diminish this to a she said-she said exchange that wouldn't result in anything positive, but that he would continue if MV wanted him to.

At this point, I told MV that my presence at this meeting was because she has alleged discrimination and named CM, my belief is that all exchanges between the 2 of them are part of the matter, and therefore my presence was necessary so make certain the assertions made by MV were not overlooked. MV said she does think it was related to the overall atmosphere at work and things like that make her more concerned about her safety at work. During this part of the conversation I asked MV what remedy might she think appropriate...what is it that you want to happen? MV replied that she really doesn't know except she wants it to stop and that she wants to come to work without the feeling that she has to look over her shoulder all the time.

This meeting also included a considerable back and forth between BK and MV about Saundra Davis and how her role as a lead person in the kitchen comes into play, and how MV feels like BK has never done anything about SD and how she treats MV during the whole time that SD has been back working at UBC. She and BK had exchanges about whether or not SD gives MV her prep sheets daily...MV says "no she doesn't...she doesn't say a word to me" and BK saying "yes, she does...I have seen her" and nothing is settled. BK asked MV if she would be ok with SD giving her instructions and then MV said" no she would not...that SD hasn't talked to her in 4 years and I don't want her to start now."

BK and I told MV that her issues were being reviewed and to make sure she informs BK as immediately as possible when things happen to her and not to wait several days or assume someone else would tell him. MV said she would do that.

After MV left BK's office, he reported to me that he knows SD has given direction to MV and that he just doesn't know what else to do. I told him I would discuss this situation with Sali for direction because a remedy that will satisfy all parties involved does not seem to be an option at this point.

E-MAIL FROM GLORIA J. COURTRIGHT TO BILL KIMES
Dkt. No. 75-20

Courtright, Gloria J.

From:	Courtright, Gloria J.
Sent:	Tuesday, November 15, 2005 3:15 PM
To:	Kimes, William J.
Cc:	Falling, Sall K.
Subject:	Vance/McVicker
Tracking:	**Recipient**
	Kimes, William J.
Delivery:	Delivered: 11/15/2005 3:15 PM
Tracking:	**Recipient**
	Falling, Sall K.
Delivery:	Delivered: 11/15/2005 3:15 PM

Bill: I have just spoken with Connie who insists she has never uttered these offensive comments. . . .I told her although it may not have been her intention, things have escalated to such a point that I'm wondering if she wouldn't be better off by looking elsewhere within BSU for a job. There was certainly more to the conversation, but basically that's the jest of it. Connie says she does intend to bid out and wonders what to do in the meantime to keep from being wrongly accused of things (the details from CMc and MV could not be more opposite!!). I told

her to avoid all conversation with MV and all conversation about MV... and to stay away from her as much as possible. I suggest that you do everything you possibly can to make sure there are no other encounters between these two women. Please keep me in the loop. ...
~Gloria

"NOTE TO FILE"
GLORIA J. COURTRIGHT
Dkt. No. 75-21

NOTE TO FILE

Date: Tuesday 12/6/05

RE: Status on Vance

Present: Bill Kimes, Karen Adkins, SKF, GJC

SKF began the meeting by stating that we all need to touch bases on the matters involving MV and what is going to happen now. She began by asking Bill Kimes to detail all the people who work in the UBC kitchen. BK and Karen Adkins went over the entire staff and their responsibilities.

SKF asked BK if he has done anymore with MV or does he believe his part ended with the counseling meeting. BK said at that meeting he advised MV that the conclusion was the counseling. We all discussed the past history regarding this type of closure and if an additional document is necessary from him or from Compliance. The determination was made that an informal meeting between BK and MV was the solution and we would draft a list to help BK remember all the points he should cover.

During the discussions some new information was learned which is not directly related to MV but is linked:

~ Butch Parker is the stock clerk/custodian at UBC; he does not interact with MV as much as the earlier stock clerk did. Butch Parker attended a meeting as witness for MV; BP is in a 90 day probationary period right now; is perceived to be a no-nonsense type and will not want to get drawn into the emotions surrounding this matter.

~ Betty Skinner is retiring this month and her absence will be felt at UBC; BS is the kind who doesn't want to ruffle any feathers, so everyone thinks she is their best friend.

~ KA stated the rumor is Saundra Davis will leave when Skinner does because Betty is supportive of Saundra.

~ BK said he heard the rumor that MV says she will leave after BS does.

~ BK said people think Saundra Davis is condescending and they don't think she is very smart about food; also that she doesn't have much authority as a kitchen lead-they don't take her seriously.

~ We discussed the remarks made by Connie McVicker and how they may have seemed to be threatening to MV.

~ SKF said that Adkins and Talley may want to discuss and reconsider having so many people directly reporting to BK. Suggestion made to look at putting someone into a stronger position than the kitchen lead; get a person who is more accessible to the workers in the kitchen and has the authority to deal with personnel matters and make recommendations to BK. SFK suggested that person not be Saundra Davis as there already exists a respect-issue with her.

~ SKF also suggested that KA might get in touch with Butch Parker off site and just talk very broadly to him; ask BP to gauge the situation and let KA know what he thinks is happening in general terms, not specifically race-based matters.

Meeting lasted a few minutes over an hour. Both KA and BK seemed to be in agreement regarding the suggestions made by SKF. GJC will highlight some bullet points for BK. BK will meet with MV and write up an internal document restating the conclusion of the matter.

Gloria Courtright
Associate Director, University Compliance
December 8, 2005

"PHONE LOG" CALL FROM
BILL KIMES TO GLORIA J. COURTRIGHT
Dkt. No. 75-17

Phone Log

Date	**Call from**	☐ **Stopped by**
12/22/2005	Bill Kimes	
Time	**Call to:**	☐ **Check when printed**
10:22am	GJC	
Dept:	**Phone Number:**	
UBC	5-3500	

Sort by Information:

Last Name:	**First Name:**
Vance	Maetta

Short Reason/Topic:
12 22 05 BK met to finalize MV complaint
Message:
Bill Kimes stated that he just finished the follow-up meeting with Maetta Vance and that "It didn't go well at all." BK stated that he felt like she id just not happy at all with his answers. BK stated that MV told him she will feel scared for her life after Betty (Skinner) is gone, and that she is intimidated, paranoid and demanded to know what he plans to do about it. BK said he told MV that he absolutely cannot do anything about her feelings, but he appreciates the fact that she is entitled to those feelings. BK said he again told MV that he does not have any witnesses to her allegations and he does not observe any reason for her to have these intense feelings. MV told BK that "they" (meaning Saundra and Connie) continued to whistle and laugh and MV takes that very personally.

BK stated at the end of the meeting he gave MV her Christmas present and he just walked out of the room. A few minutes later BK said he was informed that MV was in another room crying hysterically. BK said he went to her and asked if she was OK. BK said MV responded that she is not fine and she asked him not to interrogate her anymore.

BK said he believes nothing will make MV happy until both Saundra and Connie are gone from the kitchen. GJC agreed with BK that he can't do much about how MV says she feels and there is no obvious basis for it. BK said Saundra is responsible for getting MV the prep list for the day and usually Saundra gives a list to Betty who then gives it to MV. BK said MV thinks it's wrong when Saundra hands her a list directly, and that it is completely upsetting to MV.

BK said he is working at putting full time supervision in the kitchen. GJC asked BK if he shared that piece of information with MV and he said he did not tell her. GJC sympathized with BK for all the disruption this incident has caused and asked him to send a copy of the internal doc he will produce for Karen Adkins. GJC told BK that she thinks he has done all he can do about this situation right now.

BALL STATE UNIVERSITY
INTERNAL DOCUMENTATION FORM
Dkt. No. 59-16

* * *

*****CONFIDENTIAL*****
INTERNAL DOCUMENTATION FORM
DISTRIBUTION LIMITED -SEE BELOW

* * *

Unit: **Univ. Banquet Catering**
Date: **January 3, 2005** [sic (actually 2006]
Time: **9:05 AM**

Preparer: **Dave Ring**
Title: **Sales & Service Supervisor**

Purpose of Documentation:
Other

If other explain:
Follow-up to investigations

Type of Occurrence: **Employee Complaints**

Occurrence Dates: **12/22/05**
Time(s): **2:00 PM**

Occurrence Location:
Bill Kimes' Office

Person(s) Involved/Job Title(s): **Maetta Vance – Catering Assistant; Dave Ring-Sales/Service Supervisor; Bill Kimes- GM UBC/CC**

Witness(es)/Job Title(s):

Witness(es) statement(s) (dated and signed) attached: Yes ☐ No ☑

Recommended Follow-up:
Check with employee to see if problems are ongoing.

Recommended Action:
Increased supervision and observation.

Discipline Recommended:
Yes ☐ No ☑

Previous Disciplines for the Same Rule:

Distribution: Unit Manager ☑ Ann Talley ☑
Karen Adkins ☑ Liz VanMatre ☐
Home Unit ☑ Employee Relations ☑

* * *

EMAIL FROM ANN TALLEY
TO GARY KRAMER
AND MELISSA RUBRECHT
Dkt. No. 75-18

* * *

-----Original Message-----
From: Talley, Ann Louise
Sent: Friday, January 06, 2006 12:56 PM
To: Kramer, Gary G.; Rubrecht, Melissa S.
Cc: Kimes, William J.; Lewis, Jon Lewis; Beck, Norman E.; Adkins, Karen J.; Poore, Elizabeth Ann; Talley, Ann Louise
Subject: FW: re: Follow-up with Maetta Vance

I am very concerned that Maetta Vance continues to allege coworkers are behaving in ways that make her afraid. I think Bill Kimes has tried to settle her concerns through investigation and closer supervision but with this report (sea.IDF), the employee is even more agitated than before. She has never brought any complaints forward immediately after they happen so we don't even-know what date and time they occurred. We absolutely have no evidence that any of her allegations are correct (other than the disciplinary action that we issued to McVicker (truck driver) for calling students of color a discriminatory name based upon another employee witness who said he heard her use the term while driving through campus in the UBC truck and not within the hearing of the students involved).

The Office or Equal Opportunity advised Bill to place a management person in the kitchen at all times so behaviors of employees can be monitored. We have never eliminated the chef position held by Chef Rice. It hasn't been filled due to financial pressures in catering and the fact that Bill Kimes is very knowledgeable and capable in food production and requested we not fill it. However, he isn't supervising in the kitchen 24/7 and relies on his long term catering employees to carry their responsibilities without constant supervision. Betty Skinner, Catering Specialist, did oversee employees in the kitchen but she recently retired. We plan to request the chef position be filled because without Betty those two employees won't get along at all. Betty was often the peacemaker/mediator in their disputes.

Vance is a part-time employee. I am not anxious to move the problem to another unit but should we offer her a part-time job in another unit since her complaints are against full time people who can't be moved (Saundra Davis and Connie McVicker)? I think she really needs counseling but we don't dare suggest it given she has filed two complaints in the Office of University Compliance. Can we move her even if she doesn't accept a position in another unit? I am concerned that this already ugly situation will get worse.

* * *

BALL STATE UNIVERSITY
FINDINGS AND RECOMMENDATIONS
COMPLAINT OF
UNLAWFUL DISCRIMINATION
Dkt. No. 60-8

* * *

Findings and Recommendations
Complaint of Unlawful Discrimination
Filed by Maetta Vance against Saundra Davis
May 10, 2006

Introduction

On May 10, 2006, Ms. Maetta Vance ("Vance") filed in the Office of University Compliance a *Complaint of Unlawful Discrimination* against Ms. Saundra Davis ("Davis") on the basis of race, hostile environment, intimidation, and retaliation. Vance identifies as the subjects of her complaint pay/benefits, and job assignment, and "other" but does not specify further under that subject.

Vance is a part-time Catering Assistant at University Banquet and Catering ("UBC"); she has been employed at Ball State University since August, 1989. Davis is a full-time staff employee who serves as a Catering Specialist at UBC. Davis has held that position since August of 1986. Vance is African-American; Davis is Caucasian. Vance and Davis are

both directly supervised by Bill Kimes, UBC General Manager.

Complaint against Davis

Vance was interviewed by the Office of University Compliance on May 19, 2006. Vance alleges Davis harassed, intimidated and exhibited hostility toward her on April 27, 2006, by intentionally blocking Vance from getting off the elevator. Vance adds that she walked away from the elevator to an office where she could use the telephone to report the incident to her supervisor. Vance states that Davis entered the office and lunged at her while snatching papers from a desktop in front of Vance and causing her to be afraid that Davis might hit her.

Vance also alleges on May 6, 2006, Davis displayed hostility and retaliation toward her when both Davis and another co-worker came to the kitchen carrying gallon-size milk cartons and slammed them down on the counter and also casting "weird" looks at Vance.

Vance further alleges she was intimidated by Davis on April 29, 2006, and at other times when both were working, but does not provide any specific information regarding these alleged instances. Vance states that in general she believes that when management is not around, Davis looks at her and/or smiles at her in. ways Vance perceives to be hostile and intimidating.

Response of Davis

Davis was interviewed by the Office of University Compliance on May 25, 2006, concerning this complaint. Davis denies that she discriminates against Vance on any basis protected by federal or state law.

With regard to the April 27, 2006, elevator incident, Davis states that she was pushing a very large cart, referred to in UBC as "the tank." Davis states that the elevator doors opened and before she could attempt to move aside, Vance used her cart to hit the cart Davis had in front of Vance/Davis Findings and Recommendations her and that Vance left the cart and immediately walked away. Davis states that neither she nor Vance spoke or made any sort of comment.

Davis denies that she later lunged at Vance or snatched papers from her. Davis states she went into an office where she had been working on a kitchen order and Vance was on the telephone, but pushed back and away from the desk. Davis states that she leaned in to get the order papers off the desk and at the same time said "excuse me" to Vance.

Davis further denies that on May 6, 2006, she attempted to intimidate Vance by slamming down milk cartons. Davis states that she entered the kitchen, immediately placed the milk cartons in the refrigerator, and left the room.
With regard to April 29, 2006, as well as other dates when Davis and Vance both worked, Davis states

that management makes the schedule and she reports to work when assigned. Davis denies that she intentionally looks or smiles at Vance with hostility, and adds that she attempts to avoid looking at Vance whenever possible.

Determination

With regard to the April 27, 2006, elevator incident, it is clear that conflicting statements exist with regard to the circumstances surrounding allegations made by Vance. However, an eyewitness, interviewed one day following the incident, does not support the version offered by Vance. The witness specifically noted that the area was congested and the interaction did not appear to be intentional on the part of either party. Therefore, based on the information of the eye-witness to the event, it appears to be more probable than not that the events of April 27, 2006, did not transpire as Vance perceived them to occur.

With regard to the May 6, 2006, milk incident, conflicting accounts exist and the account of the other co-worker does not support the perception of Vance. However, even if the facts were viewed from the perspective most favorable to Vance, these behaviors would not rise to the level of unlawful discrimination. Both of these alleged interactions, even if viewed as accurate, are not pervasive or so severe as to create a hostile working environment. Further, it is important to note that Davis is a co-worker of Vance and as such has no supervisory au-

thority over Vance and cannot impact Vance's in terms of her pay, benefits, or job assignments. Therefore, based upon the investigation of this charge, the Office of University Compliance finds that no reasonable basis exists to support the allegation made by Vance that Davis subjected her to unlawful discrimination.

Retaliation Advisement

Davis is reminded that any action on her part or any act of a third party at her direction for the purpose of retaliating against any person cooperating in this investigation, including Vance, will result in disciplinary action up to and including termination.

The Office of University Compliance considers this matter closed.

By: /s/
Gloria Courtright
Associate Director, Office of University Compliance
Ball State University
Muncie, IN 47306

Date: 6-7-06

BALL STATE UNIVERSITY
POSITION DESCRIPTION
CATERING ASSISTANT
10/2006
Dkt. No. 62-15

* * *

Ball State University
Position Description

Department: University Banquet and Catering

Position Title: Catering Assistant

Reports To: Banquet Chef/Supervisor

Dates: 10/2006

Human Resources Representative: Doug Baker

This description is intended to indicate the kinds of duties and level of difficulty required of positions with this date and department; it is not intended to limit the right of the supervisor to assign, direct and control the work of any employee under their supervision. Employees are expected to perform their daily work duties and responsibilities at the standards set by management. Employees are also expected to understand and apply universal precedent over to their daily work duties and responsibilities.

Position Function:

Organize workload and prepare all types of catered food, baked goods, gourmet garniture, and catering quality presentations for served and buffet meals, receptions, and all types of catered events to groups of up to 1200 people under firm deadlines.

Duties/Responsibilities:

1. **Prepare foods such as (but not limited to) entrees, soups, salads, pasta/rice and other starches, vegetables, gravies, sauces, yeast and quick breads, cakes, pies, cookies and bars, desserts and garniture from scratch recipes, par baked goods, mixes, and other preparations using prescribed recipes and yielding finished products that exhibit catering excellence; complete manual service records as required. Utilize BSU standard recipes, menu, food production orders and supervisor's/chef's directions.**

   Requires the physical ability to walk, push, pull, climb, crouch, reach, stoop, feel, finger, stand for an extended period of time, possess dexterity and strength in the hands, arms, and shoulders, and exert up to 35 pounds of force unassisted. Task requires visual ability to read stem thermometer, menu and computer records, distinguish color, perceive depth, etc. Task requires ability to use all beverage machines, toaster, ice cream machines, ice dispenser, salad bar, food warmer, glassware and china dispenser, serving utensils, rubber,

plastic and latex gloves, and all other food service equipment. Employee is exposed to inside environmental conditions, noise, extreme heat, etc. Task requires mental ability to perform basic mathematical calculations, to receive, comprehend, follow, and provide oral instructions and information, and to read, comprehend, follow, and provide written instructions and information.

2. **Execute a frequently heavy workload of multiple and simultaneous catered events and menus with ease and minimum stress while helping maintain a fun, creative, and relaxed work environment.**

   Requires the ability to walk and/or stand for extended periods of time etc. Task requires the visual ability to direct customers to key areas, perceive depth, etc. Employee is exposed to inside environmental conditions. Task requires ability to receive, comprehend, follow, and provide oral instructions and information and to read, comprehend, follow, and provide written instructions and information. Task requires employee to exert up to 20 pounds of force occasionally, and up to 10 pounds of force frequently.

3. **Re-check all weights and measurements of ingredients assembled by others or assemble, weigh and measure ingredients as needed.**

Requires the physical ability to walk, push, pull, climb, crouch, reach, stoop, feel, finger, stand for an extended period of time, possess dexterity and strength in the hands, arms, and shoulders, and exert up to 35 pounds of force unassisted. Task requires visual ability to read stem thermometer, menu and computer records, distinguish color, perceive depth, etc. Task requires ability to use all beverage machines, toaster, ice cream machines, ice dispenser, salad bar, food warmer, glassware and china dispenser, serving utensils, rubber, plastic and latex gloves, and all other food service equipment. Employee is exposed to inside environmental conditions, noise, extreme heat, etc. Task requires mental ability to perform basic mathematical calculations, to receive, comprehend, follow, and provide oral instructions and information, and to read, comprehend, follow, and provide written instructions and information.

4. **Lead and direct helpers as assigned to the work area to promote efficiency and completion of duties at the appropriate time.**

Requires the ability to walk and/or stand for extended periods of time, etc. Task requires the visual ability to direct customers to key areas, perceive depth, etc. Employee is exposed to inside environmental conditions. Task requires ability to receive, comprehend, follow, and provide oral instructions and in-

formation and to read, comprehend, follow, and provide written instructions and information. Task requires employee to exert up to 20 pounds of force occasionally, and up to 10 pounds of force frequently.

5. **Execute high productivity: the ability and skills to work at high speed and efficiency to complete a large amount of work in a small period of time while maintaining excellence in the finished product and high standards of sanitation, HACCP (Hazard Analysis Critical Control Point).**

   Requires the physical ability to crouch, reach, stand, walk, lift, grasp, feel, push, pull, stoop, and exert up to 35 pounds of force unassisted. Task requires visual ability to read directions on cleaning compounds, MSDS forms, perceive depth, etc. Task requires the ability to use chemical compounds, cleaning utensils, gloves, masks, etc. Employee complies with University Waste Management procedures. Employee is exposed to inside environmental conditions, soaps, cleaning compounds, etc. Task requires mental ability to receive, comprehend, follow and provide oral instructions and information, and to read, comprehend, follow, and provide written instructions and information.

6. **Execute excellent time planning and time management techniques in timing the production of foods so that foods are freshly prepared, held a minimum of time**

before service, properly heated or chilled as required and dishes are finished as close to serving time as possible to achieve the highest possible quality at the point of service; foods must be ready for plating and service by the time contracted; plan and consult with the chef and/or General Manager daily; develop a work plan for several days ahead so as to even out workload, then work ahead and effectively execute multiple or difficult preparations.

Requires the physical ability to walk, push, pull, climb, crouch, reach, stoop, feel, finger, stand for an extended period of time, possess dexterity and strength in the hands, arms, and shoulders, and exert up to 35 pounds of force unassisted. Task requires visual ability to read stem thermometer, menu and computer records, distinguish color, perceive depth, etc. Task requires ability to use all beverage machines, toaster, ice cream machines, ice dispenser, salad bar, food warmer, glassware and china dispenser, serving utensils, rubber, plastic and latex gloves, and all other food service equipment. Employee is exposed to inside environmental conditions, noise, extreme heat, etc. Task requires mental ability to perform basic mathematical calculations, to receive, comprehend, follow, and provide oral instructions and information, and to read, comprehend, follow, and provide written instructions and information.

7. **Sample, judge, and correct food products for proper seasoning, temperature, and texture; make good judgments as relates to food product quality and its suitability for catering service.**

Requires the physical ability to walk, push, pull, climb, crouch, reach, stoop, feel, finger, stand for an extended period of time, possess dexterity and strength in the hands, arms, and shoulders, and exert up to 35 pounds of force unassisted. Task requires visual ability to read stem thermometer, menu and computer records, distinguish color, perceive depth, etc. Task requires ability to use all beverage machines, toaster, ice cream machines, ice dispenser, salad bar, food warmer, glassware and china dispenser, serving utensils, rubber, plastic and latex gloves, and all other. food service equipment. Employee is exposed to inside environmental conditions, noise, extreme heat, etc. Task requires mental ability to perform basic mathematical calculations, to receive, comprehend, follow, and provide oral instructions and information, and to read, comprehend, follow, and provide written instructions and information.

8. **Follow sanitary and safe food handling, public health, and personal hygiene procedures; follow Safety rules as identified in Safety/Sanitation printed material,**

manuals, handbooks, and posted information.

Requires the physical ability to crouch, reach, stand, walk, lift, grasp, feel, push, pull, stoop, and exert up to 35 pounds of force unassisted. Task requires visual ability to read directions on cleaning compounds, MSDS forms, perceive depth, etc. Task requires the ability to use chemical compounds, cleaning utensils, gloves, masks, etc. Employee complies with University Waste Management procedures. Employee is exposed to inside environmental conditions, soaps, cleaning compounds, etc. Task requires mental ability to receive, comprehend, follow and provide oral instructions and information, and to read, comprehend, follow, and provide written instructions and information.

9. **Correctly assemble, sanitize, operate, and clean all food service equipment and small tools and appliances using correct safety procedures to prevent injury; perform deep cleaning as needed.**

Requires the physical ability to crouch, reach, stand, walk, lift, grasp, feel, push, pull, stoop, and exert up to 35 pounds of force unassisted. Task requires visual ability to read directions on cleaning compounds, MSDS forms, perceive depth, etc. Task requires the ability to use chemical compounds, cleaning utensils, gloves, masks, etc. Employee complies with Universi-

ty Waste Management procedures. Employee is exposed to inside environmental conditions, soaps, cleaning compounds, etc. Task requires mental ability to receive, comprehend, follow and provide oral instructions and information, and to read, comprehend, follow, and provide written instructions and information.

10. **Check on ingredients prior to use to be sure an adequate amount is on hand and that they are in the proper condition and quality for use; report substandard ingredients to chef; gather ingredients and supplies and return unused amounts to storage; calculate manual recipe increases or decreases; deliver soiled towels to proper area.**

    Requires the physical ability to crouch, reach, stand, walk, lift, grasp, feel, push, pull, stoop, and exert up to 35 pounds of force unassisted. Task requires visual ability to read directions on cleaning compounds, MSDS forms, perceive depth, etc. Task requires the ability to use chemical compounds, cleaning utensils, gloves, masks, etc. Employee complies with University Waste Management procedures. Employee is exposed to inside environmental conditions, soaps, cleaning compounds, etc. Task requires mental ability to receive, comprehend, follow and provide oral instructions and information, and to read, comprehend, follow, and provide written instructions and information.

11. Perform other related duties as assigned.

The above listed essential functions require varying degrees of independence, judgment, and discretion. All of the above listed tools, activities, functions, requirements and conditions will be used in varying degrees.

NOTE: The duties/responsibilities of this position, and the percentage of time required to perform those duties/responsibilities may vary significantly based on shift assignment and decisions of management. All of the above duties/responsibilities are to be performed at the standards set by management.

Minimum Qualifications:

Education:

1. High school diploma or equivalent (GED)
2. Must pass BSU food handler's physical examination.
3. No allergies to soaps, cleaning agents or other materials or environmental factors in food service, e.g. steam, dust, etc.
4. Must have clean body, teeth, hair, nails and clothing.
5. Must be able to read and comprehend all specified policies and procedures for safety, hazardous material information, and university policies, procedures, and communications, and perform mathematical calculations.

6. Must be able to perform all mental and physical requirements as outlined in each duty/responsibility.

Additional Preferred Qualifications:

Education:

1. Successful completion of Meat and Vegetable/Pastry School with a score 90% on the written and practical portion of the tests.

Experience:

1. Prior Cook: related experience of one (1) year or more performing similar duties to those expected at Ball State University.

BALL STATE UNIVERSITY
LETTER OF OFFER OF EMPLOYMENT TO
MAETTA VANCE
Dkt. No. 57-15

* * *

UNIVERSITY HUMAN RESOURCE SERVICES
December 27, 2006

Ms. Maetta Vance
[address redacted]

Dear Ms. Vance:

We are extending to you an offer of employment as a Catering Assistant in University Banquet and Catering at an hourly rate of $12.51. Karen Adkins will be your supervisor, and your starting date will be January 2, 2007.

In addition to your hourly compensation, Ball State University provides excellent benefits. The annual cost of these benefits is substantial, and the university pays the greater share of this cost. To demonstrate the value of these benefits to you, we have computed the annual cost of the current benefits available to you based upon the hourly rate stated above times 2,080 hours.

University Share
Of the Cost

Comprehensive Health Protection
(Health Ins: single)
$4,953
Group Life, Accidental Death &
Dismemberment Insurance
$157
Salary Continuance Insurance
$143

Social Security
$1,991
Retirement Program
$2,238

Estimated Annual Cost
$9,492

In addition to the foregoing, there are other valuable benefits available to you, including the following:

- paid time off, holidays, jury duty, and funeral leave;
- special leaves for pregnancy, child care, and personal emergencies;
- reduced fees for university classes and other university-sponsored training programs;
- discounts at the university Bookstore and athletic programs;

- tax-deferred annuity programs and a credit union;
- outstanding exercise and recreational programs and facilities.

The value of the current benefits available to you is an important part of your total compensation package and should be considered as an integral part of this employment offer.

* * *

Your acceptance of this offer indicates a confirmation from you that the facts in your credentials are true and complete to the best of your knowledge. Regardless of the time of discovery, false statements or misrepresentations on your credentials may result in your immediate dismissal.

Please sign and return one copy of this letter either accepting or declining this offer of employment. Your response must be received by our office within nine calendar days following the date of this letter:

If you have further questions, please feel free to contact me at (765) 285-1824.

Sincerely,

/s/

Douglas Baker
Human Resources Representative

DB/bjm

pc: Karen Adkins

* * *

* * *

Muncie, Indiana 47306-0740
Phone: 765-285-1834

UNIVERSITY HUMAN RESOURCE SERVICES
December 27, 2006

Ms. Maetta Vance
720 W. Centennial Ave., #5
Muncie, IN 47303

Dear Ms. Vance:

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In addition to your hourly compensation, Ball State University provides excellent benefits. The annual cost of these benefits is substantial, and the university pays the greater share of this cost. To demonstrate the value of these benefits to you, we have

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	University Share Of the Cost
Comprehensive Health Protection (Health Ins: single)	$4,953
Group Life, Accidental Death & Dismemberment Insurance	$157
Salary Continuance Insurance	$143
Social Security	$1,991
Retirement Program	$2,238
Estimated Annual Cost	$9,492

In addition to the foregoing, there are other valuable benefits available to you, including the following:

- paid time off, holidays, jury duty, and funeral leave;
- special leaves for pregnancy, child care, and personal emergencies;
- reduced fees for university classes and other university-sponsored training programs;

- discounts at the university Bookstore and athletic programs;
- tax-deferred annuity programs and a credit union;
- outstanding exercise and recreational programs and facilities.

The value of the current benefits available to you is an important part of your total compensation package and should be considered as an integral part of this employment offer.

* * *

Your acceptance of this *offer* indicates a confirmation from you that the facts in your credentials are true and complete to the best of your knowledge. Regardless of the time of discovery, false statements or misrepresentations on your credentials may result in your immediate dismissal.

Please sign and return one copy of this letter either accepting or declining this *offer* of employment. Your response must be received by our office within nine calendar days following the date of this letter:

If you have further questions, please feel free to contact me at (765) 285-1824.

Sincerely,

/s/

Douglas Baker
Human Resources Representative

DB/bjm

pc: Karen Adkins

* * *

DEPOSITION OF MAETTA VANCE
Dkt. No. 58-3

* * *

[3]

MAETTA VANCE, having been first duly sworn to tell the truth, the whole truth and nothing but the truth relating to said matter, was examined and testified as follows:

DIRECT EXAMINATION,

QUESTIONS BY MR. SHOCKLEY:

Q. Good morning. Would you please state your name and spell your last name for the reporter.

A. Maetta Vance, V-A-N-C-E.

Q. Ms. Vance, I introduced myself before we got started. I'm Scott Shockley. To my right is Shawn Neal. We are attorneys for Ball State University and the other defendants in this case. Have you ever testified in a deposition or in court before?

A. Yes. A deposition in a car accident I had in 2003. I had a deposition before.

Q. That was in an auto accident case?

A. Yes.

Q. And were you the plaintiff?

A. Yes.

Q. If there was a deposition, it sounds like a lawsuit was filed. Do you know if a lawsuit was filed?

A. Yes.

[4]

Q. Was that here in Delaware County?

A. Yes. The lawsuit was -- the accident was here in Indiana, in Muncie.

Q. Has it been resolved or --

A. Yes.

Q. -- is there still an open -- it was resolved?

A. Yes.

Q. Was it settled, or was there a trial?

A. Yes, it settled.

Q. All right. Well, you've been through this maybe once before, but I'm still going to go over just a few of the things that tend to make these work better.

A. Okay.

Q. I will ask you a series of questions, obviously. If I ask you a question that for any reason seems vague or unclear, confusing, I invite you to ask me to start over and try again. All right?

A. Okay.

Q. And if you go ahead and answer me, I'm going to assume you understood the question. Is that fair?

A. Yes.

Q. It's important for the court reporter that only one of us speak at a time. All right?

A. Okay.

[5]

Q. So I will promise to try to not speak over you if you're in the process of answering me, and it's also important that you wait till I finish my question before you start to answer.

A. Okay.

Q. That's something we all do in conversation. It requires a little concentration here, but if either one of us don't do that, she'll let us know

because she can only record one of us at a time.

A. Okay.

Q. It's also important that you answer my questions out loud. A nod of the head is not something she can take down in the transcript. All right?

A. Okay.

Q. This is not an endurance contest. I don't think this is going to take a long time. I'm going to estimate maybe a couple of hours, though, and if you want to take a break at any point in time, just say so. We probably will take one in an hour or 90 minutes, but if you feel like you need to, please just say so. Okay?

A. Okay.

Q. I know from looking at some of the history here that at times -- I don't know if it's proper to call it an anxiety disorder, but I know that

[6]

you've seen your doctor about anxiety, so if having to be here today and answer questions and all upsets you, we'll take a break until you feel like continuing. Is that fair?

A. Okay.

Q. And if Mr. Kress objects to anything I say, just -- we'll hopefully both stop talking, let him state his objection, and then the lawyers will work out whether or not you need to answer the question. Okay?

A. Okay.

Q. One thing I don't intend to do -- you may think my question asks for it, but I don't want you to tell me what you've talked to your lawyers about.

A. Of course.

Q. That's privileged. Nobody is entitled to know that except you and your lawyer. But sometimes a question may be broad enough that it might suggest or include that conversation with your lawyers in its sweep. And I don't mean to do that, so don't tell me that stuff. All right?

A. Okay.

Q. Okay. Can you tell me a little bit about your background, meaning where you grew up, where you went to school. I don't want a lot of detail,

[7]

just a little bit about who Maetta Vance is.

A. Yes. I was born in Columbia, Mississippi, in 1957, and my family moved to Chicago, Illinois, when I was three. I went to public school there, and then we come to Muncie, and I went to middle school and Central High School. And I began working at Ball State in 1989, August of 1989. And I just loved my job, and I did the best that I could there. And I've caused no problems while I was there. I've had no write-ups and no disciplines. Did what I was asked to do.

And Pat Brown was my manager in 1989 until 19, I believe, 91. And then Bill Kimes took over. And I started as a waitress and I moved up to part-time. We were all told that we'll have two -- we'll have full-time within two years, but that didn't happen. But I just continued to work there because I loved what I do and I was good at it.

Q. Okay. Let me stop you there. That's a good summary. Did you work anywhere else before you started at Ball State in '89? After you left Central High School, did you work anywhere else?

A. Yes. I worked for a Village Pantry on East Jackson. I worked there for a while. And I

worked for a daycare which I don't think is there anymore. I married in '83, so I was pretty well much a housewife and just --

Q. Do you have children?

A. I have -- I had a miscarriage, which that was years ago, and I raised my stepson which is married with children of his own now. And I'm divorced.

Q. Any other family in the Muncie area?

A. Yes. I have a -- my mother lives here, and I have a sister, an uncle, a grandmother, a great-aunt. Yes, I have family here.

Q. So did I understand correctly that Mr. Kimes has been your supervisor since 1991?

A. I believe that's when he started, in '91. I can't say the exact day.

Q. Pat Brown the two or three years before that?

A. Pat Brown was my boss from '89 until '91. I believe it was '91. But for the majority, about ten years, she was my supervisor.

Q. Now, I'm aware that -- I believe it's correct to say you filed a complaint in the year 2001 about some things with Saundra Davis, right?

A. Yes, that's correct.

Q. So we'll talk about that in just a second. But in

[9]

the approximately ten years, if that 1991 date is correct, until this incident with Saundra Davis in 2001, Mr. Kimes was your supervisor?

A. That's correct.

Q. And did you have any trouble with him over that ten-year period?

A. He seemed to not like me from the beginning, because he just looked over me like I wasn't there. And when he introduced hisself to the other co-workers, he didn't speak to me. So I went to his office and introduced myself and wanted to shake his hand, and he pulled his hand back, so -- and made the statement, "Isn't there something else you could be doing?"

Q. This is when he started back in the early 1990's?

A. Yes.

Q. Were there other African-American employees in UB -- I'll call it UBC. Is that fair?

A. UBC. That's what we called it.

Q. -- in UBC then?

A. I am really trying to think back that far.

Q. The other thing I didn't say is if you don't remember, that's --

A. I don't remember quite there, but there were some before him, and I don't believe -- Greta May

[10]

(phonetic). I believe there was one or two there, but they quit. Yes, there was a few there.

Q. All right. Other than that incident when Mr. Kimes started and so forth, the introductions and so forth, did you have anything else that happened between you and him in that ten-year period before the Saundra Davis matter in 2001?

A. He treated me differently than he did the other employees. I mean that by saying I started out in the salad area, as everyone did, and then I was promoted to the meat area. And I kind of liked going back and forth because it's a challenge, and it makes the day go faster doing multiple things. And then bakery things along with that.

I was helping Saundra Davis before. I was made -- I was told to go help her out and then go back and forth from the meats to the vegetables, meats to the bakery, just back and

forth. It was a good thing. And we got along before Bill Kimes was there.

Q. You and Saundra got along?

A. Yes, we did. We got along before he come -- he was there. We talked co-worker talk and family talk. And after he got there -- and Lou Rice was also there. He was a chef there at the time. And

[11]

I don't know what transpired to make this whole thing flip over to one side, but it was kind of like because she was there before me.

And just one day in '91, I was over in the meat area, and she was in the bakery area, and we had -- we were talking about the food that went out, because the catering business is a hectic business. Food started going out; contracts are in and out. She just said that I didn't know what I was talking about and started yelling from her area to my area.

Q. The chef?

A. No. Saundra Davis did. And I had my back turned, and then she came from her area, the back of the head.

Q. Now which was a long distance, and slapped me on, this is in 2001?

A. 2001, correct. April.

Q. And I wanted to talk to you about that in some detail.

A. Okay.

Q. But I'm really interested in everything --

A. Everything --

Q. -- for the period of time before that.

A. Right. Before that, we got along well.

Q. So for approximately ten years, you and Saundra

[12]

got along well?

A. Yeah, we got along well. She spoke to me and I spoke to her, and we took breaks together. And that was under Pat Brown's management.

Q. Well, you told me, I think, that Pat Brown was there from when you started in '89 until maybe around '91 --

A. Well, she was there previous, before me. See, they were all there before I was.

Q. But from '91 until this incident in 2001, Bill Kimes was the supervisor?

A. Right. So I guess its fair to say -- I'm sorry -- she was there a long time before me, but I started in '89, and she was my boss from that point on. It was a long time.

Q. So for this ten-year approximately --

A. Yeah.

Q. -- period, '91 to 2001, Kimes is in charge of UBC; you're working occasionally -- you're off and on with Saundra Davis?

A. Uh-huh.

Q. And you get along normally with Saundra Davis?

A. I did before he got there. And something happened. I don't know what quite happened with the -- with the -- because she had seniority over

[13]

me, and everyone knew that, but just the way her demeanor kind of changed when he got there, I don't know if it's because she had more time to me or what, but that never was a problem with me because someone had to be first. And --

Q. Well, I don't mean to ask you this over and over, but I'm confused.

A. Okay.

Q. Saundra Davis's attitude and demeanor toward you changed clear back in '91, or it changed in 2001?

A. Oh, I'm so sorry. 2001, yeah. I am just -- I'm so sorry. Yes. My dates -- yeah.

Q. All right. And --

A. Because I'm speaking -- not '91. Oh, my God. That's -- forget that. I'm thinking 2001, '99. That's what I'm thinking. Yeah. I'm so sorry.

Q. What's your best recollection of when Kimes started?

A. It was '91. It wasn't -- I mean 2001. I'm so sorry.

Q. It was 2001?

A. I got ten whole years mixed up. Yes, sir. I'm sorry. That was a mistake.

Q. Okay. That's all right. Now is the time to clear them up.

[14]

A. Right. Pat Brown was the boss in '89 up to 2000 or 2001.

Q. So Kimes has been your supervisor from 2001 to 2006?

A. '99 --

Q. Or 2007?

A. Yes. But '99 is when the incident happened with Saundra and myself. It was April of 1999. So Bill was there. He was there. And I got ten
whole years mixed up. That probably threw you off. I'm very sorry.

Q. Well, whenever -- whether it's '99 or 2001 -- Kimes started, he's been in charge of UBC since then, and you've been an employee there since then?

A. Yes.

Q. During the time Kimes has been there, has your job changed? Has your job description and assignment changed?

A. Yes. It changed from being the meat department, making homemade foods from scratch, to he -- he put me in the bakery area. He said that's where he wanted me to be, and that's where I went.

Q. Was that okay with you?

A. He said it, so that's what -- whether I liked it
[15]

or not, that's where I went.

Q. Well, that's --

A. It wasn't okay with me, but he's my boss, so I did what he said.

Q. Your preference would have been to stay in the meat section?

A. Yes.

Q. Did that involve a change in your pay when you went from meat to bakery?

A. No, it didn't. It paid the same.

Q. Did it involve a change in your hours?

A. Well, I got a second job after I was divorced, so I worked two jobs for like eight years approximately, so -- and that didn't matter to him, because he said bakery needed to be done the first part of the morning, so he scheduled me 5:00 to 1:30 a.m.

Q. P.m.?

A. 5:00 a.m. --

Q. 5:00 a.m. --

A. -- to 1:30 p.m., yes.
Q. -- to 1:30 p.m.? That was so you could go to your second job, wasn't it?

A. Yes. Uh-huh. And it was fine with him.

Q. Was Mr. Kimes the person who would fill out your

[16]

annual performance reviews?

A. Yes, he would be the one to do that.
Q. And would you look at them with him?

A. Yes. He didn't give me one until 2005, though.

Q. He didn't give you one in '01, '02, '03, '04?

A. No, he didn't.

Q. Do you know whether he gave other employees reviews during that period of time?

A. I don't know. He gave some and then not others, I was told, but he never gave me one.

Q. Who told you that?

A. I think a custodian maybe. Some people I can't

remember their names, but I heard one or two people say they had an evaluation. It's just who he picked and choosed to give one to. I didn't get one.

Q. It's going to be -- and like I said earlier, if you don't remember, you don't remember. I don't want you to guess. But wherever possible, it's going to be important to this process for you to be able to tell us who it was that told you things. So if you don't remember --

A. I can't remember.

Q. -- that's fine. But --

A. Yes.

[17]

THE COURT REPORTER: You need to wait until he's finished talking, please.

THE WITNESS: I'm sorry.

THE COURT REPORTER: You're fine.

Q. While we're on the subject, the 2005 review that was created for you, how did you feel about that? Was it fair? Was it accurate?

A. He gave me a fair one. Said that I cleaned my area; I asked questions when needed; when we were out of stuff -- I'm just trying to remember

what he said. I don't have it in front of me. But he gave me a fair one.

Q. Did you receive regular raises through the times Mr. Kimes -- since Mr. Kimes became your supervisor?

A. Yes. We all got yearly raises. Ball State in general, everyone did.

Q. Do you know whether or not he had the authority to recommend, for whatever reason, that you not receive a raise if he chose to do so?

A. I don't think he had the power to do that.

Q. You were not a member of the union at that time --

A. No, I wasn't.

Q -- is my understanding. Do you know whether or not the raises nevertheless were required by the

[18]

union collective bargaining agreement?

A. I believe so, but I wasn't part of that, so I don't know.

Q. And it's your belief that a supervisor could not

withhold a raise from an employee if, for whatever reason, the supervisor thought it was proper to do so?

A. As far as I know, no.

Q. Did Mr. Kimes ever subject you to any kind of discipline?

A. No. Well, once he did. I was on workman's comp for a knee injury, and he wrote me up. It was an allergic reaction to some medication. He wrote me up back in 2004, I believe -- I'm not sure -- for excessive absenteeism.

Q. When you say he wrote you up, does that mean it was a written reprimand or what, if you know?

A. He signed it -- yes. He signed it as being a verbal warning.

Q. Or a written warning probably if he signed it?

A. Yes, it was written, because he gave me a copy.

Q. Did you lose any time at work? Were you suspended for any period of time?

A. No, I wasn't suspended.

Q. Or was your pay docked or withheld or anything

[19]
like that, if you recall?

A. I can't recall. See, it was set up for -- like, we used to have sick days, but they took those away for some bargaining -- and we had paid time off for vacation days, so I didn't have any of those days. I was on workman's comp, so I believe they took care of that. I believe.

Q. What do you remember about why -- let me rephrase that.

What was your understanding of why management thought you were excessively absent from the job?

A. I couldn't understand why he put that down there. I was on workman's comp, and I had an allergic reaction to some medication, and I presented to him a doctor's excuse, so I don't know why he would write me up.

Q. That's your understanding today, or that's what you thought at the time, or both?

A. I thought at the time why was he writing me up. And he kind of smiled to me and then wrote me up and gave me a copy of it.

Q. Anything other than that that you can recall? Any other disciplinary action other than that that Mr. Kimes took against you?

A. Well, he picked with me throughout the years that

[20]

he was there. He'll give me eight hours a week and give the others 30 and 40 hours a week. He'd not let me go to special places like --

Q. Okay. Let's stop for just a moment.

A. Okay.

Q. We'll talk about that kind of stuff, but disciplinary –

A. Discipline, no.

Q. -- actions, like the excessive absenteeism write-up that you described?

A. Never a write-up.

Q. You're familiar that there's an employee handbook at Ball State?

A. Yes, I am.

Q. And there's what's called progressive discipline in there that says, for certain kinds of things, supervisors can write employees up, correct?

A. Yes.

Q. And the absenteeism, that was one of those kinds of matters, correct? I mean, it was handled as one of these kinds of matters identified in the employee handbook?

A. I don't recall that being part of their -- being workman's comp and under a doctor's care, I didn't understand why --

[21]

Q. I'm not asking you to agree with whether he was right or not.

A. Right.

Q. But when you look at the handbook and it talks about employee discipline, absenteeism would be one of the things on there that it says --

A. It says that.

Q. -- supervisors can write people up for? So other than that, there weren't any occasions when he wrote you up, correct?

A. Correct.

Q. Or suspended you from -- made you miss work you were scheduled to do, correct?

A. Made me miss work? I don't understand.

Q. You're scheduled to work and he says, Maetta, take the next three days off; you're suspended.

A. No.

Q. That never happened. Okay. Did you receive any promotions from the time Kimes started, which we think was 2001 or '99, somewhere in there, until today?

A. Well, I made full-time January of this year. Karen Adkins came over October of 2006, I believe, and one of the co-workers were going to quit, so -- and he was telling me this, that he was

[22]

going to quit if he couldn't get full-time and benefits and all the above. And there has never been a full-time catering assistant job -- that's my title now -- before, and they said there would never be one. But they created one and put it on the board. I didn't know anything about it. Brad got to go to the office and discuss it with him.

Q. Who is Brad?

A. Brad Hudson (phonetic) is my co-worker. And lo and behold, I didn't think anything of it, and one of the night supervisors -- night custodians told me was I going to bid on that job on the board. And I asked her, "Job on the board?"

And she said, "Yeah. There's two catering assistant jobs on the board." Which I wasn't made aware that there would be one, but Brad knew it. So I went over the next day and bidded on it before the deadline. And usually you bid on it on a Sunday, and Wednesday you would know who got the position, but this took months before we knew about it. For one reason. Brad was injured, so he was not at work.

Q. So had Brad also bid for the job?

A. Well, because he was telling me that he was going to quit if he didn't get a full-time job, so yeah,

[23]

he bid on it.

Q. What about him being injured connects in your mind with the fact it took a while to fill this job?

A. Because when they post a job, there's never been this long delay before anyone knew about who received the job. It's from Sunday to Wednesday. That's been the rule basically.

Q. What is your recollection of how long it was between when you bid on it and you were informed you had the job?

A. At least a couple months.

Q. A couple months?

A. Yes. It was discussed in October, and it was up for bid in November, and no one got it until January officially.

Q. And you have that job now?

A. Yes. They -- and it was -- Karen Adkins called me and asked me did I want the job, but it would be flexible hours, so I would have to not work another job and work that. And I said, "Of course I would want that." And I took it. And then they asked Maria, which she had more time than Brad did. She's a co-worker.

Q. What's her last name?

A. Maria -- I forget her last name.

[24]

Q. Okay. That's all right. But only one Maria?

A. There's only one Maria, yes. And she called and asked her did she want it. She said yes. And then five minutes later, she called her back and said no, she would give it to Brad. So she gave -- they put Brad on the phone and he accepted it. She gave it up so Brad can get it. They're real close friends at work.

Q. I'm confused. I'm sorry. So Brad could get the job, but I thought you got the job.

A. I got -- they opened two positions.

Q. Oh, all right.

A. Yes. There was two positions.

Q. So you and Brad both got full-time jobs at approximately the same time?

A. Yes. The same day.

Q. As full-time catering assistants?

A. Assistants, the same title I had before.

Q. All right. Now, you had been offered a full-time position in August of last year, hadn't you?

A. I believe so. It was a pot and pan job. Is that the one you're referring to?

Q. I'd have to look it up.

A. There was -- they offered me one for the dining service, which that's what I am in. Dining

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service is catering, because we're all food service --

Q. Right.

A. -- but we're different, if you would. Now, there were two full-time jobs offered. One was offered as a Cook 1 over in one of the dorms. But they work nine months a year, and I work twelve in catering, so that wasn't a good thing. To me, it wasn't.

Q. Your recollection then of the August offer --

A. I believe it was August -- I'm trying to figure out if that was the pot and pan job or the Cook 1 job. There were two offered.

Q. Your recollection is that the full-time job that was offered to you in August was not in university banquet and catering?

A. It was -- I believe it was the pot and pan job offered because one of the co-workers had bid out to another unit, a full-time pot and pan person, so I believe that's the one.

Q. But was that within UBC or --

A. Yes.

Q. -- some other place in dining hall services?

A. It was in UBC. One of them was UBC, but it was a cut in pay making less than what I was making as a

part-time person.

Q. Per hour?

A. Per hour, yes.

Q. But it would have been 40 hours a week, 12 months a year?

A. No. Because he didn't give us 40 hours a week. He gave us sometimes 32 hours a week because he said he didn't have to give full-time people 40 hours a week.

Q. Okay. How many hours a week did you average as a part-time employee?

A. He'll give us sometimes 32, 24, 38, 40, whatever he wanted to give as a part-time; and sometimes we made 40 hours a week, as well as the full-time people; and then sometimes the full-time people made 32 hours like the part-time people. So we couldn't figure out -- there was some confusion there.

Q. And sometimes full-time people got overtime because the work –

A. Yeah.

Q. -- required or necessitated them working more?

A. Yeah. He'll say who he wanted to make overtime and who he didn't.

Q. Well, I mean, banquet and catering, the nature of

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the work it does varies tremendously --

A. Yes, it does.

Q. -- from, say, the scheduled work in student dining hall, correct?

A. The hours?

Q. Not a very good question. Let me try that again. Student dining hall, you have kids who live in the dorm; they're going to eat six or seven days a week; they're going to eat between certain hours; and that's all pretty much scheduled through the nine-month school year, correct?

A. Pretty much.

Q. UBC, on the other hand, may have a lot of banquet activity, a lot of stuff going on at the same time, around certain periods of the academic or calendar year, and it may not have a lot going on on any given week or period of time, correct?

A. From my 18 years of experience, there has -- we would tend to slow down when Christmastime come around when the students are gone

and maybe in January a little bit, but we're pretty busy throughout the year. I mean, I have been when I've been there, because we do outside caters for the public. We deal with the public more so. So there's always something to do all the time.

[28]

Q. Well, let's try to close the circle on this August of 2006 job offer. Was the kitchen help dish room position full-time -- understanding, as you said, sometimes that's 32 hours and sometimes it's 40 or more -- full-time in banquet and catering? Is that the offer that was made?

A. Yeah. There was a pot and pan.

Q. And you declined that?

A. With reason.

Q. You told me one reason was it was a cut in pay. Did I understand that correctly?

A. That's one reason, correct.

Q. Were there other reasons?

A. Yes. Because I was a cook, and that's what I enjoyed doing. And doing the pots and pans would have been -- and laundry, that's out of the norm of what I'm accustomed to, if I will.

Q. As a classified full-time employee, you would have received benefits that you weren't then receiving as a part-time employee, correct?

A. Oh, I was paying for my own benefits out of pocket.

Q. As a part-time employee?

A. Yes.

Q. And when the offer was made to become a full-time

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employee, you'd get those benefits largely, if not entirely paid for, by the university, correct?

A. Yeah. That would have been the fact, yeah. That would have been --

Q. And you have those now as a result of the January catering assistant job?

A. Yeah, the --

THE COURT REPORTER: I didn't hear your answer.

THE WITNESS: I was just answering him.

THE COURT REPORTER: I know, but I need to know what you said. I didn't hear the answer.

THE WITNESS: The question?

THE COURT REPORTER: Your answer. I didn't hear you.

THE WITNESS: Yes.

MR. SHOCKLEY: Her answer was, I think -- correct me if I'm wrong -- yes, now she has this --

THE WITNESS: Full benefits.

MR. SHOCKLEY: -- paid for largely, if not entirely, by the university since they took her full-time job in January.

MR. KRESS: Really try to let him finish the question. It will make it easier for you, too.

[30]

THE WITNESS: Okay.

MR. KRESS: I know you know what the question is going to be, but it's not like a normal conversation.

THE WITNESS: All right.

MR. KRESS: You're doing fine. You're doing fine. You're doing great.

MR. SHOCKLEY: It's hard to do.

THE WITNESS: I'm sorry.

MR. SHOCKLEY: It's human nature to hear part of the question and start thinking about the answer, if not answer it, so --

THE WITNESS: Okay.

DIRECT EXAMINATION (Continuing),

QUESTIONS BY MR. SHOCKLEY:

Q. Okay. Since Mr. Kimes started, have you ever been put on probation of any kind?

A. Just the probation -- you mean for work or probation for discipline? Is it for either one? Yes. We were on probationary periods for, I believe, 60 to 90 days.

Q. When you became a full-time employee?

A. Yes. That's the only time.

Q. Other than that --

A. No.

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Q. And you've never been demoted, have you?

A. Well, if that's a question of feelings --

Q. It's not. I'll be more specific.

A. Specific.

Q. Has your pay ever been reduced?

A. Pay never reduced from the other -- as far as I know, no, it hasn't been reduced.

Q. Have you ever been reassigned to a job classification that you thought was less meaningful or less fulfilling?

A. Yes, I have.

Q. By Mr. Kimes?

A. Yes.

Q. When did that happen?

A. After January, when I went into his office and we had --

Q. Of this year?

A. This year.

Q. 2007?

A. When I got the full-time position. He told me that I'll never come in at 5:00 in the morning, and I've not done any baking and I've been doing that for years, and now my job is over in the salad area. And I was told by Patsy, the chef -- they were asking why was I over in the salad area

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making salads as opposed to making things from scratch where I come from in the bakery.

And no one is to be over there with me. I'm alone. And in the meat area, there's Brad, Maria, and Tracy. And in the bakery area, there's Saundra, and she gets a student to help her. But yes, I feel that's pretty degrading. What I'm doing now is not meaningful. I'm doing less than I was doing.

Q. You bid on and asked for this job, didn't you?

A. I bid on a cook's -- full-time cook's position, and it came with -- that's cooking. Like, Brad and I are equals, so we should be cooking and making up recipes. You kind of follow me? Because the salad area was -- is normally for a sub or a part-time person.

Q. I thought you said you were a catering assistant, a full-time --

A. Catering assistant.

Q. -- catering assistant.

A. Yes.

Q. And did the job description tell you you would continue as a baker as you had been before?

A. In every area. I was supposed to be in every area. That's what my job requisite right now

[33]

says. My requirements, it says that I can -- in every area.

Q. As needed?

A. As needed now, yes. But --

Q. So if management decides you are needed to prepare salads, wouldn't that be within the job description that you bid for?

MR. KRESS: Objection; vague and ambiguous. You can answer.

THE WITNESS: Excuse me?

MR. KRESS: You can answer.

A. I'm trying to draw a picture how I was working by myself in the bakery area doing two and

three pages of work, and now I can't even cook anything. I find that degrading because now I'm just putting salads in a bowl and putting dressings in a container. And Brad gets to cook my meals for me, and I have to go serve them after he cooks them, preps them for me. I can't prep my own meals. Do you see what I'm saying? And we hold the same title.

So I feel that he's giving him preferential treatment above me. You see? And I've been there much longer than he has, so there's something right
there. I feel there is definitely. He

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doesn't need to prep my meals for me, because I showed him how to cook, because he used to be a truck driver. I'm trying to make you understand what I'm saying.

Q. Well, I understand what you're --

A. Yeah.

Q. -- saying, but --

A. But that would make me incompetent, wouldn't it, if you would?

Q. Well, we're not here to, you know, get in a dialogue and you ask me questions. Okay?

A. Yes, sir. Okay. I'm sorry.

Q. If you want to tell me that's how you feel or it makes you feel, that's fine.

A. Okay.

Q. But what I want to go back to is there was a job as a full-time catering assistant posted, correct?

A. That's correct.

Q. And you voluntarily applied for that, correct?

A. That's correct.

Q. Management didn't come and tell you, Maetta, you're a part-time bakery chef now; we're taking you out of there; you're going to go over here and make salads for the rest of your career or for the foreseeable future, correct?

[35]

A. That's correct.

Q. So then when this job was awarded, management assigned you to make salads, right, is what you're telling me?

A. I'm telling you that, yes.

Q. Who's back doing what you used to do now?

A. The supervisor, Saundra, which she's part of management because she doesn't clock in.

Q. She's making the salads?

A. No, she's --

Q. I'm sorry. She's doing the baking you used to do?

A. Yes. With two or three helpers.

Q. Other than that, are there any other actions that the university has taken since Kimes became your supervisor that you believe constitute a demotion?

A. Demotion, no. I'm just doing what -- he makes me a list out, and that's what I do. I try to do them.

Q. Before we move on, I don't have this stapled in multiple copies. I didn't think we'd have to use it. But let's mark this, and then I'm going to ask if you can identify this as the position description for the catering assistant job we've been talking about that you now are employed as.

(The Court Reporter marked a document for

identification as Defendants' Exhibit A.)

Q. Take a look at that. And my question is, is that the position description for the job that you bid late last year and started in January of 2007?

A. (Witness reviewing exhibit.) Yes, this is what I'm talking about. Precisely, yeah.

Q. That's what was posted that you bid on?

A. Yes, this is what was posted.

Q. That's -- I just wanted you to identify it.

A. Okay.

Q. All right. Let's talk about what happened in 2001, which you started to tell me about and I kind of stopped you so we could catch things up-to-date before that. What happened between you and Saundra in 2001?

A. I was over in the meat department working on some deli trays. She was over in the bakery area doing what she does in the bakery. She was a -- she was a baker before I was. And there was a cater going out, and they ran out of meats, so I was rolling more meats to send out. And she said, "They already got those meats."

I'm like, "No. Bill just came in and asked me to prepare more meats for backup." It was off-site.

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And she started yelling, "You think you know everything," and just started talking -- yelling from her area to my area.

And I'm like, "I'm going to continue to do this because Bill told me to do it." And she was trying to, I think, intervene with what he was telling me. So I just kept rolling them up. And then she -- I turned around, and she was over there in my area and yelling in my face and just all in my face. And I just turned around. I'm like, "Look, I don't want to argue with you." She came in my area. I didn't leave my area. She came to mine.

And then I turned around, and she slapped me in the back of the head and took off running and screaming. And there was a meeting in the Pineshelf. I distinctively remember that because the lady came out because the yelling and cursing was so loud. Bill Kimes and Chef Lou Rice came to the kitchen and asked, "What is going on?" Saundra said, "I made a mistake and hit Maetta."

Q. Did you hear Saundra say that?

A. Yes, I did.
Q. And did she say that to Lou Rice and who else?

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A. Bill Kimes. Yes, she did.

Q. Anybody else?

A. That was sitting right there -- well, okay. I'm getting to that part. That's who was all in there. Well, there was the two ladies in the salad area, Edith Phils (phonetic), which she doesn't work here anymore -- up there anymore, and another lady. I forget her name. They were in there when she hit me.

Q. Were they in a position, if you know, where they could have seen --

A. Directly.

Q. -- her hit you?

A. Directly, yes. Because the salad area is to the right of me; the meat area is right there; and that's where I was standing.

Q. Okay. Go ahead.

A. And so she said that, and after she admitted that she hit me, she was like, "Well, I'm sorry. I'm sorry." And then she proceeded to keep cursing. "She thinks she knows every damned thing, and I'm sick of her shit." And then she kept -- you know what I'm -- kept going on and on. But I just stood there and tried to figure out what they were going to do about her putting her hand -- that's

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in the rule book. You don't touch another person. You just don't do that.

And so they told her to leave and made me stay at work. And Amy and Brad was on the stairs, and Amy said that -- she came out the door crying, going down the stairs, and she asked what was wrong. And she said, "I hit Maetta," and proceeded and left. And the next day she came in and I came to work.

Betty Skinner (phonetic) and Phyllis Hollinger (phonetic) were the immediate supervisors at the time. And I was over doing some work over in the bakery area that day. And they both came up to me and told me if -- they were told if I said anything else about anything,
to send me home. And Saundra came around the corner and said -- and started threatening me. Said if I got fired -- if she got fired, I was going to get fired.

So later that day, Bill Kimes and Karen Adkins called me into the office. Bill asked me to demonstrate how Saundra hit me. So I proceeded to slap him on the head like she did. And Karen Adkins was sitting in there. She said -- I'm sorry.

[40]

Q. It's all right. Do you want to take a break?

A. Huh-uh.

Q. We can take a break.

A. Karen Adkins then said that I wouldn't know the discipline actions that they was going to take against Saundra for doing that. And she said, "Saundra said you two were buddies and you two were friends." And they started making light of the situation. And, of course, nothing happened. Nothing happened.

Q. Saundra said who was friends?

A. She went to them and tried to cover up hitting me by saying we two were friends and just --

Q. That you --

A. And her were --

Q. That you, Maetta, and Saundra were friends?

A. Yeah, they were friends.

Q. And you had been friends for ten years or more before that, right?

A. Yeah. Until Bill came and until she violated me by hitting me. Then I don't --

Q. Right. Until that incident?

A. -- have friends. Yeah. Up until about a week before that or a couple weeks, and she started changing her attitude because she wanted to be --

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because we knew that she had more years than me. That was never a question. Someone had to be first. I didn't care about that.

Q. Okay.

A. But back to this hitting thing. And they said that they would never -- I would not know the disciplinary actions they took against her. Shortly thereafter -- I don't know in months or week increments, but she left after I went to affirmative action to file a complaint, and Sally Fallings told me -- proceeded to tell me how good of a person Ann Talley was and on and on and on.

And I just said, Okay, she's leaving; I'll just leave this alone. I'll just -- I can just -- I'll forget about it pretty much. If she's gone, I don't have to face her. I didn't know that they were prepping her to come back to be a supervisor over me.

And one day Betty told me -- I think 2000 when she came back. I forget the direct time right now. I can remember the exact time that she came back. And Betty Skinner put her

arms around me and told me that she wanted to be the first one to tell me that Saundra was coming back, and she was going to be a supervisor, but she was

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not to tell me what to do and to stay away from me. And that, I thought, created another problem.

Q. Let's stop for the moment. So for approximately ten years before this incident, you and Saundra had been either friends or it's fair to say --

A. Co-workers.

Q. -- co-workers --

A. Treating each other with respect.

Q. -- treating each other with respect, had not had words with each other or problems with each other?

A. No.

Q. And on this occasion, for whatever reason, she raises her voice, you get in an argument, but then she comes to your area and hits you?

A. Yes.

Q. And you've told me everything that she did or said in conjunction with that, right?

A. To my recollection, yes. That's -- and we had a disagreement on the catering. But why she came over to my area is unknown to me. I don't know why she would do that. She's never --

Q. You've told me what she said, whatever it was, when she came over and as she hit you, though --

A. Right.

Q. -- right? And then later, apparently the same

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morning or day, statements she made to other co-workers or supervisors about hitting you, right?

A. Hitting -- yes.

Q. And did she ever say then why she hit you?

A. No. She said when Bill Kimes came in the kitchen and Lou Rice came in the kitchen that, "I hit Maetta, but I'm sorry. I'm sorry. I made a mistake. I hit her."

Q. All right. Did you accept that at the time?

A. No. I was upset because she slapped me.

Q. Do you think she lost her --

A. Because she slapped me really hard.

Q. -- temper?

A. I would say that.

Q. Anything else that Saundra said about why she did what she did that day?

A. She just was yelling out -- just yelling and saying that I thought I knew everything and -- well, Lou Rice boosted her, for one thing: Yeah, you've been here longer and yeah, you're this. I think they kind of boosted her up. Lou Rice did.

Q. How did you get along with Chef Rice?

A. He didn't care for me, and everybody knew it.

Q. Did you make complaints about him to Bill Kimes?

[44]

A. And also to Ann Talley. Yes, I did.

Q. What was the subject or reason for your complaints about Chef Rice to them?

A. Well, he just was being bullying to me, towards me, and telling me, you know, "I think you've been here too long." And then there was an incident with my grandmother. We thought she was going to die. She was in very bad shape at the hospital. And I'm very close to my grandmother. And he made the statement, "Well, you got to die sometime." And I thought that was very cruel.

So I went to Ann Talley, and she came over and was trying to, you know, Well, he is a good person and I got him for this reason. They always evaded why I called them over there. They pretty well much jumped over the facts and started telling me how he's going to make a difference in this place and everything and everything towards that person and not trying to be, you know, considerate or telling me -- I mean, trying to be responsive to what I'm saying. They never did do that. So she said, "Just dry your tears up and go back to work." Ann Talley did.

Q. Before this incident with Saundra Davis, in the years you had been at UBC, had you seen arguments

[45]

between employees that escalated into shouting matches? Did that ever happen?

A. Yeah.

Q. How often did something like that happen?

A. Well, I wasn't everywhere at every time, but there was an incident with Bill and a couple females. There was an incident with Bill and Donn Knox. And there were a few incidents that he would shout, kick trash cans, even put his hands on employees.

Q. You've told me about Bill. My question was actually broader than that. How about between any two employees, arguments that escalated to --

A. Escalated to hitting?

Q. -- shouting? Not hitting. Shouting matches.

A. I can't recall right now. Shouting matches, no, I can't -- I can't -- I can't answer that one because I can't be for sure on when it was, but probably it did happen.

Q. So in any event, up to the time this happened, would it be fair to say you considered Saundra at least a friend, a casual friend?

A. A co-worker, yes. I listened to her problems that she was having at home. And she would bring them to work and ask me what would she do, and she had

problems at her home.

Q. Cordial to the same general kind of extent that most co-workers are?

A. Well, everyone has --

Q. Mutually respectful?

A. -- problems. No, we just respected each other by -- you know, because I gave her respect, and I wanted it back the same way I gave it to her.

Q. And prior to the hitting incident, she did give the respect back?

A. Well, she cordially talked about her problems pretty much.

Q. And you didn't have any reason --

A. Yeah. I was sympathetic to her problems. It was a co-worker thing, to get along at work and make the day go pleasant.

Q. I mean, prior to this hitting incident, you didn't have any reason to fear her or think --

A. No. She never did threaten me or hit me. No, she never did that. But we was never buddy buddies. We were co-workers the whole time.

Q. Did she do anything to disrespect you before this hitting incident?

A. She did nothing to -- I can't say that she did do anything to me in a disrespectful -- like I said,

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we wasn't buddy buddies. She would say, "I need help."

And Betty would say, "Stop what you're doing. Go help Saundra." I just did what I was told there at work and tried to make it as pleasant a workplace as possible.

Q. Now, I've seen or have a couple documents you filed in 2005 containing sort of your -- I guess we could call it summary of complaints about things that had happened in 2005.

MR. SHOCKLEY: Let's mark this as B.

(The Court Reporter marked a document for identification as Defendants' Exhibit B.)

A. (Witness reviewing exhibit.)

Q. Have you had a chance to look at B?

A. Yes.

Q. Is that your signature on the second page?

A. Yes.

Q. And did you write this out in your own hand?

A. Yes.

Q. And this is a complaint at Ball State pursuant to its internal complaint procedure, isn't it?

A. This is correct

Q. Pertaining to some events, the allegation is, occurring in September of 2005 involving Saundra

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Davis and then leading then to your supervisors, correct?

A. That's correct.

Q. Since the incident in 2001, had you filed any other complaints at the Ball State affirmative action office that you remember prior -- I mean in between --

A. After the --

Q. -- 2001 and this one in 2005?

A. I don't believe I did. From the hitting, you mean?

Q. Right. Since the hitting --

A. And then --

Q. -- and until this --

A. No, I don't think I have.

Q. -- in the fall of 2005. Okay.

A. I can't -- yeah. Only with Sally Fallings I was going to. And then Saundra left, so I didn't. Other than that, I can't recall if I did or not.

Q. Now -- and I'm paraphrasing here, but in your narrative, it says: On September 23rd of 2005, Saundra Davis threatened me on the elevator to do it again, saying when was this going to stop. I may have read two sentences there. What does "saying when was this going to stop" mean?

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Is that something she said to you, or is your comment -- I guess I'm unclear on that.

A. No. She said to me.

Q. "When is this going to stop?"

A. Yeah. And, "I'll do it again," was her exact words.

Q. Did she indicate to you what she meant by "this"?

A. No. But I took it as a threat. Because I know what happened -- she and I haven't spoken in about seven years or so. And I get on the elevator to go -- I had biscuits in the oven. The door opened. I was just going to go up there, because the stairway was locked, to get an ingredient that I needed. And she was on the elevator with a cart between us both. And she was over by the buttons, and I was by the door, so I –

Q. So it's been four years since this thing in 2001, correct?

A. Yeah. Between the time she left and the time she came back.

Q. Well --

A. Yeah.

Q. -- she left sometime after the events you complained about in 2001. Do you know when she came back in relation to these events in September

[50]

of 2005?

A. I'm trying to think. She was gone for about three or four years. I'm not clear on the time. I know she was gone for three years, and then

Betty Skinner told me one day she was coming back as a supervisor.

Q. Well, her records are going to show when she came back.

A. Right.

Q. In any event, this is the first new problem you had with her since 2001, correct?

A. Other than words that she said, but I didn't say anything about that. I just kept -- just --

Q. What do you mean "words that she said"?

A. Well, her and another co-worker, a worker downstairs -- it's kind of a unit. We're dining service, but downstairs is like dining service and part of UBC. But, anyway, her and the lady -- I forget her name now -- they were up and standing in front of me, and they were talking about one of those old shows that used to come on TV. Called me Buckwheat. Yeah, they were standing right directly in front of me across the counter.

Q. Now, when is this happening?

A. That was sometime when she came back. I can't

remember the exact dates. But it was words said here and there that I just took it, things -- and she'd walk around me and smile and whistle, and I just took all that, and I just tried to not look at her, just do my work.

Q. This is before --

A. This is after she came back.

Q. This is after she came back --

A. As a supervisor, yes. After Saundra came back as a supervisor, she was back at UBC.

Q. But before this incident on the elevator?

A. No. That was afterwards. No, that was before. I'm sorry. Yes. I'm sorry. Yes, that was before the incident. Words -- she was saying little words, this, that, and that, but I didn't go make complaints on it. I just did my job because it wasn't -- I just let it just roll off my back.

Q. What did she say?

A. Things like the Sambo jokes or whatever, Buckwheat, you know. Just little things. Just little things. It was nothing -- she didn't say, Hey, Maetta, you're Buckwheat, but, you know, I was the only black person, and Sambo, and they're standing across looking at you, so

you're kind of thinking it's about you. You know what I'm

[52]

saying?

Q. Were there any witnesses to those statements?

A. Oh, those two. They're friends. The one girl downstairs. I can't even recall her name. She's not there anymore. But there was no witnesses. Usually there are no big witnesses around.

Q. Well --

A. Okay.

Q. -- this is something that was said before the elevator incident that's in Exhibit B, yet after 2001 when she came back as a supervisor?

A. Uh-huh.

Q. Okay?

A. Yes.

Q. There was a witness whose name you don't remember?

A. I can't -- I can see her face. I can't remember. She transferred to another building. I can't remember her name right now. Sorry.

Q. All right. This document talks about witnesses on the second page: Amy Geesman, Jim Hiday --

A. Yeah.

Q. -- Julie Murphy, Donn Knox. Was it one of those people?

A. No. Those were the people to witness the previous stuff back in the past, like when she hit me and

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being on the truck with her. I think that says that in here, and Julie Murphy witnessing -- that's McVicker. That's on another whole -- are we talking about McVicker right now?

Q. We'll get to that.

A. Okay.

Q. We're talking about Davis right now.

A. Right.

Q. I just wanted to know if any of them were the witness we can't identify. And these things --

I've asked you this, but just to be clear -- predate filing this document on November 7th of 2005, right? "These things" meaning these statements you're indicating Davis made, Sambo jokes and things like that. It's your testimony that that was before this. right?

A. Before the elevator. That's correct.

Q. After the elevator incident, you, on October 20th of 2005, write all this stuff out, correct?

A. Yes.

Q. And you don't mention anything about those statements in this complaint, do you?

A. Anything about the Sambo jokes?

Q. Yes.

A. No, not on this one. But there was another one

[54]

that I think I put that on. It looks like that paper. It may not be on there. And every little thing that's happened, no, I didn't, because I can't remember every little thing that has happened to bring us up to this point. There was little things, and I probably didn't mention all of them.

(The Court Reporter marked a document for identification as Defendants' Exhibit C.)

Q. Take a look at what we've marked as Exhibit C. I think that's what you were gesturing toward a minute ago and said it might be that.

A. It may not be on there, period.

Q. Well, take a look at Exhibit C.

A. Okay. (Witness reviewing exhibit.) I don't think I put it on there.

Q. And this is a document that is all in your handwriting, about seven pages long, right?

A. Uh-huh.

Q. There's a number of events summarized in it, correct?

A. Uh-huh.

Q. You filled this out for the National Association for the Advancement of Colored People, correct?

A. That's correct.

[55]

Q. And did you give it to their local representative here in Muncie?

A. Yes, I did.

Q. And who was that?

A. Jayne Beilke.

Q. Do you know Ed McNeary?

A. Yes, I do.

Q. Did you ever talk to Ed about this case?

A. Yes.

Q. When did you talk to Ed about this case?

A. Jayne Beilke referred me to him after this complaint was filed.

Q. I know at one time Ed was the director, the local director, of the NAACP. Was that still true in 2005?

A. I think he's still -- he's not -- you mean the president?

Q. Maybe that's the title.

A. Yeah, I think he -- but he's not the president anymore. Jayne Beilke is, of this chapter, of the Muncie --

Q. Did she say why she was -- Jayne Beilke, did she say why she was referring you to Mr. McNeary?

A. I can't recall her exact words, but she said he can better help me. It was something to that.

[56]

Because I think she teaches out at Ball State. I really don't know her really reason, but she called me one evening and told me that he can probably best help me with this. But she's -- she has since then wrote a letter saying that she was still behind it.

Q. Have you talked to Mr. McNeary's wife, Ella, about your case?

A. Well, that's his wife. When I was over to her house -- because they live together as husband and wife, so we had a meeting over there. And she read the newspaper. It's in the paper.

Q. Did you know either Ed or Ella before 2005?

A. No, I had -- no.

Q. And, I mean, obviously, I've noticed in some of our discovery things asking about Ella McNeary and her case some years ago with Ball State. What did she tell you about -- or Ed, for that matter -- what did they tell you about her case?

A. Well, actually, Betty Skinner made me familiar with what happened to Ella. My supervisor constantly brought that up, about Ella suing over -- they were just making conversation about how Ella was done wrong over in dining service and something about Ann Talley overlooked her for a

[57]

job, and they were the ones that told me about Ella McNeary.

Q. Well, did you talk to Ella and Ed about her case?

A. Well, I really am not interested in what happened to her. I didn't, but she kind of told me some things that happened after I was at her house.

Q. What did she tell you?

A. She just showed me the thing that was in the paper and said how they pretty well much did her wrong on occasions. But I wasn't wanting to talk about her case. I wanted to talk about what was going on with me. But she just was briefly telling me that. But I heard more at work about her case than what she ever could tell me. Betty Skinner and Phyllis made sure I knew everything that went on with that situation, my supervisors.

Q. Back to Exhibit C, the NAACP document, I think you told us this, but just to be sure before we move on.

A. Okay.

Q. This doesn't mention Saundra Davis saying racially related things about you, does it?

A. I'm not reading every line, but I'm not seeing it so far.

Q. Is it your testimony here today that before you

[58]

filed this complaint with the equal opportunity office at Ball State, which is Exhibit B, and you filled it out in October of 2005, that Saundra Davis had, in conversation with another employee, but within earshot of you, talked about Sambo jokes or you mentioned Buckwheat, I think?

A. Yeah. They were talking across the counter, looking at me, but not saying my name. So I didn't feel like I needed to put that in there because they didn't say, Maetta is Buckwheat or, per se, say. You know what I'm saying? -- my name. They didn't say my name, but they were saying it.

Q. You heard them say things that had a racial element to them, and you didn't think it was important enough to put it in a seven-page --

A. I thought it was important --

Q. Let me finish my question.

A. Oh, I'm sorry.

Q. -- a seven-page, handwritten, personal claim to the NAACP?

MR. KRESS: Objection; misstates her testimony. You can answer.

A. I couldn't think of every little thing that they did to me. And I'm sorry I didn't put that on

[59]

there, but it did happen. I probably should -- I didn't put it on there, and I'm thinking in putting it down there -- I didn't see it, but I could have sworn I wrote it somewhere. But every little thing that has been done to me is not documented with the NAACP. Just the things that I can -- that was stuck in my head at that time.

And I'm just not -- I'm just -- you know, my brain did not kick out -- it didn't kick that out, but it happened. And I could have sworn I put it somewhere, but I guess I'm not seeing it.

But every little thing, as I said before, that has been said and been done to me is not -- I didn't write it down.

Q. All right. Let's return to Exhibit B. There's this event on the elevator, and you've told us about that. Did I ask you if there were any specific witnesses to what happened on the elevator?

A. No one was there but she and I, and Betty came in shortly after.

Q. Came in the elevator?

A. No. Betty came to work about 30 minutes after that happened.

Q. And that's when she heard --

[60]

A. I told her. My immediate supervisor, so I told her what happened. And Saundra went over to, I believe, another building with Bill, and they did an investigation with her, but they waited till the end of my shift to get my statement from it.

Q. What is your understanding -- well, wait a minute. I'm looking at the second page, at the end of the top paragraph, over in the margin. There's another date mentioned. It says: On September 26th, '05, when I arrived at work, I

had a physical and mental meltdown. Felt like I couldn't breathe when I saw Saundra Davis and Connie McVicker.

Did I read that correctly?

A. Yes, you did.

Q. Now, this is the first mention of Connie McVicker in these documents. How long had Connie McVicker been a co-worker of yours in UBC before September 26th of that year?

A. I believe she was there five or six years. I don't know the exact date right now. I can't remember. She's been there some time.

Q. It goes on to say: Connie throughout the summer -- so I guess that's the summer of 2005 -- had been making statements to employees.

[61]

I'm going to go ahead and use this term here once, and then we'll just call it the N word. Okay? Because I know it's offensive.

She had been making statements to employees how she hated niggers and mumbling to me words I did not understand when she passed by me and saying to employees how she has relatives in the KKK. I can't take this anymore.

Did I read that correctly?

A. Yes.

Q. So at the time you saw Connie then on September 26th, other employees had told you about these statements by Connie McVicker. Am I understanding that correctly?

A. That's correct.

Q. And who told you those things?

A. It was Julie Murphy, Amy Geesman, Brad Hudson, which I didn't put on there because he told me after I wrote that that she was referring to me as "the nigger in the bakery." He wrote a letter to Bill, he told me, and gave it to her because he was tired of hearing her refer to me as that. I don't think that's on the paper either because that came out after this stuff surfaced. Then they started talking more about it.

[62]

Q. Well, after this surfaced, there was an investigation, as you know, where Kimes or others went around and talked to these people.

A. Right.

Q. But is that what you're referring to when you say Hudson gave a statement?

A. I don't know about the investigation because I wasn't included and neither was Donn. Just a few people was included in that investigation because -- and neither was Julie. So I think Brad and maybe Maria were the only ones included in the investigation. Because they didn't include -- I didn't go to Bill's office and get the -- well, I did. But Julie said they couldn't recall. Neither did Amy. Neither did Donn Knox. Some of the people weren't included in part of that.

Q. Well, my point or my question, I guess, is this: Are you telling me that -- or is it your understanding from Hudson that he gave a statement or a letter to Bill before you filed this complaint saying Connie was saying these things out in the workplace?

A. That's my understanding, yeah.

Q. And that's based on what Brad told you and how you interpreted it?

[63]

A. Yes. And he --

Q. But you don't know that of your own personal knowledge; you just know what he told you or--

A. In my face. And he said -- yes.

Q. All right. But you had been hearing these things over the course of the summer --

A. Yes.

Q. -- from your fellow employees?

A. Yes.

Q. Had you gone to Mr. Kimes or anybody to make a complaint about what you were hearing about the kind of language or terms that Connie McVicker was using?

A. By the time I heard what they were telling me, they went to Bill and told Bill Kimes. And by the time I heard that and then she was following me around -- that was in some documents; I was just keeping tabs on what she was doing -- I pretty much had a meltdown after the elevator incident and that was -- because it was not at the end of the summer. I believe this was in September when I made this -- I believe it was around sometime then.

Because I was on and off -- I wasn't at work, as I can recall. I think I was still on workman's

[64]

comp and just working part of the day, so I didn't go directly to Bill and say about this, what I heard, but he already knew of it.

Q. How do you know that?

A. Because Brad told me and the co-workers that was saying that they heard her say it went to Bill and said it. I don't know for a fact, but I do know that they went to him and they can -- they can --

Q. So the only way to know that for sure is to talk to your co-workers --

A. That's correct.

Q. -- and whatever kind of -- talk to Mr. Kimes and whatever kind of records there may be?

A. Yes.

Q. Because you don't know when your co-employees first talked to management about Connie McVicker's language, do you?

A. I don't know the date. No, I don't.

Q. And if I understand it correctly, this is coming to you secondhand from your co-workers, right?

MR. KRESS: Object to the form. You can answer.

MR. SHOCKLEY: I'll try again.

Q. Let me put it this way. Connie McVicker never came to you and used the N word, called you an N,

[65]

did she?

A. I don't know what she was meaning when she followed me and was staring at me. She called me a monkey in my face.

Q. We'll get to that. She never used that word directly to address you, as I understand the history of this case from all the paper I've seen, correct?

A. She -- no.

Q. Yes or no?

A. No, not nigger. No, she didn't.

Q. All right.

A. Well, what she was mumbling, I don't know, but not -- she didn't come up and say that to my face.

Q. You've told me she called you a monkey.

A. Yes.

Q. So we'll talk about -- let's put that aside for the moment. Anything else face-to-face or in your presence obviously intended for you to hear that was of a racially insensitive or derogatory nature? Did Connie McVicker say anything?

A. She looked at me in hatred with her mouth shrivelled up and mean-mugging me and whispering stuff that I couldn't quite hear what it was.

Q. Tell me about when she called you a monkey.

[66]

A. Betty Skinner was there, myself, and Connie, standing by the freezer. I was still baking at the time, and I was going to the freezer to get brownies out. They were both standing side by side as close as he and I together (indicating). And she started singing, "Hey, monkey." And I know Betty had to hear it.

Q. Betty was close as --

A. Yeah.

Q. Betty was as close as you were?

A. Yes. They were both all in the same area because the freezer was right there.

Q. Betty was the supervisor at the time?

A. Yes. Betty Skinner. And she denied that she heard it.

Q. Oh, okay. So she was singing it?

A. Yes.
Q. Were there --

A. "Hey, monkey," and looking at me and laughing.

Q. And when was that in relation to your November or October --

A. I can't remember --

Q. -- of 2005 complaint?

A. -- the day. I believe that was shortly after -- I can't remember the exact day. There's notes about

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that. It was shortly after the 2005 incident I'm trying to think if it was 2006.

Q. Okay. Well, here's something that may help us.

(The Court Reporter marked a document for identification as Defendants' Exhibit D.)

Q. Okay. Ms.Vance, take a look -- well, first of all, do you recognize this as your complaint in this lawsuit?

A. Yes, I do.

Q. Okay. Take a look at Paragraph 18. That says: On or about November 8, 2005, McVicker called Vance a monkey at work. In addition to verbal attacks, McVicker continually follows, laughs, and stares at Vance.

A. Yes.

Q. So does that help you refresh your memory with regard to --

A. It was 2005, yes.

Q. And it was November 8th?

A. Yes.

Q. After this event on November 8th of 2005 with McVicker, as alleged in Paragraph 18 here of your complaint, when's the next time you have what you would deem a problem with McVicker's behavior?

A. Every day I had to look at her, because it's an

open concept. She was standing at the end of the hall just staring and looking and just --

Q. Let me be more specific. After this, did it ever happen again that, to your face or in your presence, she used any racially derogatory terms or called you any names or anything? Did that ever happen?

A. In my face, I can't recall her doing that

Q. What I'm trying to determine here is what, if anything, McVicker did after this November 8, 2005, incident that you believe was hostile to you as an African-American.

A. Calling people monkeys and then mumbling and following them around the building and -- those things are hostile, to me.

Q. Well, I'm trying to look at the chronology or the timeline here. Okay?

A. Uh-huh.

Q. And I understand you've said those things. On this date, she called you that name. What since then?

A. Just having to be around her pretty much has been a constant reminder of all those things. And I can't explain to you how I feel about that. You just have to be me, and you're not.

Q. All right. Were you interviewed by the university affirmative action and compliance office after this complaint, Exhibit B, in October of '05?

A. Yes.

Q. To your knowledge, did they conduct an investigation?

A. Gloria Courtright, yes, she did.

Q. Let me show you a letter from Ms. Courtright.

(The Court Reporter marked a document for identification as Defendants' Exhibit E.)

A. (Witness reviewing exhibit)

MR. SHOCKLEY: Let's go ahead and take a break. And when we come back, I'm going to ask you if you've read that, so if you want to do that during the break, Ms. Vance.

(AT THIS TIME THERE WAS A RECESS, AFTER WHICH THE FOLLOWING PROCEEDINGS WERE HELD:)

Q. Have you had a chance, Ms. Vance, to read Exhibit E?

A. Yes.

Q. Do you remember receiving that?

A. Yes.

Q. Were the statements in there accurate at the time they were made?

A. Yes.

[70]

Q. All right. You then filed a charge with the EEOC. Actually, you filed two of them, but let's mark this.

A. Can I -- at the end of --

Q. Yes.

A. -- exhibit --

Q. And you're talking about E, the letter?

A. Yeah. I spoke with Gloria on a couple occasions. I didn't feel comfortable talking to Bill about these because he would laugh and smile and take it as a joking -- in a joking way, but she continued to tell me to coordinate with Bill Kimes, to talk to him about it. And I felt like he was part of the problem instead of trying to find a solution.

Q. Well, at this point, meaning this letter of October 26th, you've now filed a formal complaint with university compliance. I've called it equal opportunity or affirmative action. That's what it used to be called.

A. Right.

Q. Same office. And I think you said this was the first time you had filed a formal complaint with them, right?

A. I think so.

Q. So then when she says in her letter, "...I would

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encourage you to communicate directly with Mr. Kimes any information you might have regarding this matter," is that what you were referring to?

A. Yes.

Q. Are you telling me you didn't do that after this October 26th letter or --

A. No. I did confer with her.

Q. So you followed her instructions?

A. I followed her.

Q. Do you know what action Mr. Kimes took against Connie McVicker as a result of your complaints, which were Exhibit C? I think Exhibit C, your first complaint. No, I'm sorry. Exhibit B.

Do you know what actions Bill Kimes took against Connie McVicker after his investigation of your complaint in Exhibit B?

A. He didn't discuss them with me.

Q. Did you ever learn later from any source what action Mr. Kimes or the university took against Connie McVicker?

A. Well, on occasion, Julie Murphy saw the time sheet, and she seen that they gave her three days off. Connie told Julie that they were going to give her three days off with pay. Then again, that's Julie talking. You would have to ask her.

[72]

Q. So the answer, I guess, is you don't personally know?

A. Because I wasn't aware of any discipline.

Q. All right. So --

A. Can I say something?
Q. Yes.

A. Because I was reading in the handbook and I think -- do you have a copy of the handbook?

Q. Yes. But where are we going? Like I said --

A. I'm not asking you any questions.

Q. -- I get to ask the questions.

A. Right.

Q. But I think this is it.

A. Yeah, I was just referring to that because I don't know what they took toward it. But I'll let you ask the questions.

(The Court Reporter marked a document for identification as Defendants' Exhibit F.)

Q. Okay. So you should have in front of you now Exhibit F. Do you recognize that as a charge of discrimination you filed with the U.S. Equal Employment Opportunity Commission?

A. Yes.

Q. It looks like, at least, it's signed by you on December 28th of 2005 and then sworn to by the

notary on December 28th, the same day, right?

A. That's correct.

Q. Now, this says in the text, in the middle paragraph: "On October 20, 2005, I filed an internal complaint..."

And that's Exhibit C that we looked at earlier, right?

A. Right.

Q. Then it says, "...in doing so, I have suffered adverse employment actions."

You signed this on December 28th of the same year. This is about two months later. What are you claiming happened to you in this two-month period that you believe was an adverse employment action?

MR. KRESS: Objection; requires a legal conclusion. You can answer.

A. Then again, I'd just say you have to just be me, to be put in that situation, because these people are not going to admit anything I say.

Q. Well, I --

A. I filed a complaint of them doing these things to me, so I had to suffer the stares and the looks and the -- just to be in that environment is what you have to put yourself in to feel like I was

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feeling. I didn't -- it was just an overall manager/co-worker thing inside that unit that didn't go outside that unit. It was just the way I was treated differently than –

Q. I'm not asking -- I agree with your lawyer's objection. I'm not asking you to determine what is adverse action under the law. I'm just asking you for what happened to you that caused you to say this in the second paragraph of your complaint.

A. I'm finding words hard to put it. I just felt like a half a person, if I would. I just felt not -- a sense of mocking there and just -- I can't -- I can't put it into words. I just -- it's in feeling form, the adverse --

Q. Did anything happen more tangible than the feelings you had about your situation?

A. I may have them written down, but I probably can't remember them at this time. They're -- it's probably written down in words somewhere in my notes. It's just -- and this is 2007 and things have happened. I can't -- but something did happen to make me have to file this -- to file that complaint.

Q. And I'm not going to go through and ask you to

[75]

identify all of these things. We may do some of them later. But you did bring a bunch of --

A. Yes.

Q. -- records, and your lawyer gave them to us before we started. And among other things, some of those pages are your notes, right?

A. Yes.

Q. Are those notes you kept as matters happened?

A. Yes.

Q. Were any of them summaries you've gone back and tried to reconstruct from memory?

A. No, I didn't reconstruct them. I just told them as they was.

Q. Did you fill out Exhibit F, or did somebody fill that out for you?

A. I filled out Exhibit F.

Q. Angelia Gordon -- I don't know if she still is -- at one time, she was employed by the Muncie Human Rights Commission. Is that the same lady?

A. That's the same lady.

Q. Was she employed there, if you know, in December of 2005?

A. Yes.

Q. Did you go there intending to file your complaint with the Muncie Human Rights Commission?

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A. Yes.

Q. But she referred you, it looks like, to the EEOC?

A. Yeah. Yes. She took a statement from me, which I wrote, and then she referred me to them.

Q. Did she type this up, or did you?

A. She typed it up as my words telling her.

Q. But the information on here is what you told her?

A. Right.

Q. To your knowledge, did she conduct any kind of investigation?

A. No. She referred me -- she knew I had a lawyer. She referred me to the EEOC.

Q. Again, I don't want you to tell me anything about what your communications were with your lawyers, but are you telling me at the time you filed this you had already at least consulted with an attorney?

A. That's correct.

Q. Now, this says that -- do you see the box that says dates discrimination took place?

A. Yes.

Q. The earliest, January of 2000; latest, October 6th of 2005. Did you supply that information?

A. Yes. Because I went down there on -- yes. And she was aware of this because I went -- I've been

[77]

down there before, in January. She has record of that. I can't specifically say what day it was.

Q. But the information as far as the time frame for the alleged discrimination would have come from you, correct?

A. That's correct.

Q. And was that accurate and correct when you made it?

A. The statement?

Q. Regarding the time frame within which the discrimination took place.

A. Yeah, just about. Yeah, because -- and I think it goes all the way back to the hitting.

(The Court Reporter marked a document for identification as Defendants' Exhibit G.)

Q. Take a look at Exhibit G, please.

A. (Witness reviewing exhibit.)

Q. Do you recognize Exhibit G?

A. Yes.

Q. Is this the second complaint to the Ball State office of compliance regarding your employment at UBC?

A. I believe so.

Q. Is this in your handwriting?

A. Yes.

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Q. And it looks like, although the date is a little cut off, that you wrote this out on May 10th of

2006, which is the same date of the received stamp at the compliance office, correct?

A. Yes.

Q. And does this contain what you thought was important for university compliance to know about the environment at your job, at least between the last complaint you filed in October and this one --

A. Yes.

Q. -- in May? So a six- or seven-month period?

A. Yes.

Q. The first date I see is an event occurring on April 27th of 2006, again between you and Saundra Davis, again involving the elevator, correct?

A. That's correct.

Q. Had there been any other specific incident that occurred that you believed was -- well, let me rephrase that.

Had there been any other specific incident that occurred in your job since you filed the complaint in October of 2005 and before this one that you believe was serious enough to be reported to the office of university compliance?

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A. I can't remember. But I do know this one is important. This was important enough for me to file.

Q. Well, I mean, I accept that answer, but if there is something else -- I'm trying to move through this chronologically, and if there's something else that happened in this six- or seven-month period --

A. From November until April?

Q. Yes.

A. There's been so many things happening I can't remember.

Q. Well, typically this is the only chance I get to ask you questions about specific things, so if you remember it later, it's not --

A. I know I filed one in October, it says, and I filed this one in May. I filed one in November. I think it just speaks for itself almost.

Q. What's the one that you filed in November?
A. You mean with the office of compliance?

Q. Yes.

A. I'm only aware of these two.

Q. Do you think there's a third one?

A. No. Those were probably just going to Bill with complaints. Because the immediate supervisor --

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you have to go through the chain of command, they tell you, so that's probably just something between Bill and I.

Q. All right.

A. If I had -- as Gloria was telling me to confer with him, I was doing -- that's probably what I'm thinking.

MR. KRESS: I'm confused now, and I don't mean to interrupt, but Exhibit B is dated November.

MR. SHOCKLEY: Yes. She signed it in October.

MR. KRESS: Okay.

MR. SHOCKLEY: I think October 20th. And I guess I didn't ask her why it was two or three weeks before it was file-stamped.

MR. KRESS: I just kind of wanted --

MR. SHOCKLEY: Yeah.

Q. Okay. That's fine. So there may be some other things that at the time you deemed significant enough to report, but you may have reported them to Bill Kimes and not to Gloria Courtright or Sally Fallings?

A. Yes.

Q. All right. This first event, April 27th of 2006,

[81]

you and Saundra on the elevator, tell me what happened.

A. I was getting off the elevator, and the door opened and she just was standing there. I was trying to get off, and she wouldn't let me off.

Q. Any witnesses to this?

A. Susan Sowers (phonetic) was there, a co-worker. She stood there and watched her block me with the cart. She doesn't work there anymore either.

Q. So you were on the elevator; you were trying to get off; she had her cart waiting to get on the elevator?

A. Yeah. And I was going toward getting off the elevator, and she just stood there.

Q. How did that --

A. So it was apparent that I was trying to get off the elevator because I was going towards the door.

Q. Were you able to get off the elevator?

A. No. She just stood there.

Q. Did she come on the elevator?

A. No. She just stood there. And I was like,

"Excuse me. I'm trying to get off." She just stood there and smiled at me.

Q. So how did this -- I mean, what happened? How did this --

[82]

A. She finally moved.

Q. She moved?

A. Yeah. Because the door kept closing.

Q. She moved and you got off?

A. Yes.

Q. So there's a bit of a standoff for a while?

A. Right.

Q. And neither one of you wanted to give in to the other?

A. No. I was -- that's the floor I pushed to get off on, and my cart was back, and when the elevator door opened, I proceeded to get off. So that would tell a person you're trying to get off the elevator.

Q. Okay.

A. Yes.

Q. I might have been in the elevator and hold the door with the person with the cart to get on and then exit. I mean, it --

A. It was a little cart, so I was standing against the wall, and when the door opened, I proceeded to the door.

Q. Well, my point was you could have waited on the elevator until she got her cart on there and then left.

[83]

A. There was no room. Two carts can't come on the elevator at the same --

Q. Oh, you had a cart, too?

A. Yes.

Q. Okay. So were any words exchanged?

A. No. I didn't say anything to her. Just trying to get off the elevator.

Q. All right. And then it says: I later -- I'm looking here at Exhibit G. I later went to call Bill, who was at the alumni center.

A. Yes.

Q. And she -- what's the next word? -- something at me?

A. Where are you reading at?

Q. It's the fifth line. It's your narrative under description of the alleged act.

A. Oh, she came over by the telephone -- I was sitting there calling Bill at the alumni -- and lunged toward me.

Q. Lunged?

A. Yeah. Like (indicating). And that kind of made me jump backwards.

Q. You mean she reached and grabbed for you or what?

A. Well, it looked -- she just reached and then she went over to get some papers. It was like one of

those type of things. I'm sitting there –

Q. She lunged at me and snatched papers is what that says.

A. Papers, yeah.

Q. But there wasn't any physical contact or anything?

A. No.

Q. Any words exchanged?

A. I can't remember saying anything to her. I got on the phone -- I got Bill. I believe I got him.

Q. Now, am I correct that it's your contention that at this time at least, Saundra Davis is your supervisor?

A. Okay. You have to get the group of co-workers together because one day she's a supervisor; one day she's not. One day she's to tell people what to do, and one day she's not. It's inconsistent. So I don't know what she is. But I do know she was said not to talk to me, period.

Q. Well, that's not really my question.

A. She doesn't --

Q. At times -- are you telling me that at times, intermittently, once in a while, she was your supervisor, or she was the supervisor of others or -- I'm not sure what your answer is.

A. We're not sure either. And that's my honest

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opinion.

Q. You don't know if she was or wasn't your supervisor?

A. No. Because Bill said one day she is and one day she's not.

Q. Then I'm trying to break this out as a separate event. I think it is. You then say: Last pay period in April, I worked through two lunch. Chef was informed I didn't get breaks and was aware -- well, you just tell me in your own words. What is that next few sentences about? What's your complaint there?

A. I didn't get a lunch break, and the chef was aware of it, and she said she was going to let Bill know so I could get paid for them. And there was several occasions that he never paid me. I worked straight through my breaks, because being a baker, you can't stop and go sit down, because you got rolls proofing, baking, or something is always going on, and you can't stop the process.

So I didn't get breaks lots of times, and I never -- I worked through them. I did. Because I was the only baker, and I couldn't get them every two hours like other workers did. So I told her specifically that day I didn't get them, and she

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was going to make sure Bill knew it. And he knew it, and he still didn't pay me for them.

Q. How do you know he knew and still didn't pay you for them?

A. Because she went and told him.

Q. Who is "she"?

A. The chef. Chef -- I think -- which chef was that?

Q. Was that Kelly (phonetic) then?

A. Kelly, yeah.

Q. Are you positive that pay wasn't included -- well, let me back up.

As I understand it, the time clock automatically deducts a lunch break from your --

A. Correct.

Q. -- time after you clock in, right?

A. That's correct.

Q. And if your work duties or whatever require you to work through that lunch break, you're supposed to tell somebody so that that automatic deduction can be corrected?

A. That's correct.

Q. And your testimony is you did tell the chef?

A. That's correct.

Q. All right. Isn't it true that within the next few weeks, that missed half-hour lunch break pay got

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corrected and you ultimately got paid for that?

A. Not all the time, in my case. I told him this -- this specific time, it was well before the time when he had -- and he told her -- he wrote it on the paper, and she came back and confirmed it with me. Because I -- you keep a history of your pay scale, so you'll know what you're going to get paid and what you're not. But he didn't put it on there. And I think maybe he might have later on, but --

Q. That's my question.

A. Yeah. After. But it was like the beginning of the pay period, so it should have been on -- he didn't make a mistake with anyone else's.

Q. Well, how do you know that?

A. Because Brad and the rest of them always got their overtime and always got their pay, and he always made sure of it because they -- they'll tell me that.

Q. Well, so you're assuming that if they didn't tell you they got skipped and delayed a pay period, that they, therefore, got paid regularly?

MR. KRESS: Object to the form.

Q. Would that be true?

A. That's exactly true.

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Q. You can't know every detail about –

A. No.

Q. -- how they get paid and when they get paid?

A. But working in an environment, you do know who's getting treated and who's not getting treated. You know that.

Q. My question is --

A. I mean, there's some things, when you see them --

Q. -- you don't know of your own knowledge whether Brad or any of the other 20 or 30 employees in there got skipped or delayed in getting their paid lunch caught up, do you?

A. I can say that they did, because they would brag about the overtime that they got.

Q. Well, that's not my question, what they bragged about.

A. Yeah, that they got paid for it.

Q. Well, are you -- I'll move on. Are you telling me--

A. I'm just going from what --

Q. -- you know every detail --

A. -- they're saying. I don't know --

Q. -- of how they got paid and --

A. -- every detail.

Q. -- when they got paid?

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A. I don't know every detail, no. You're right. I don't know every detail.

Q. And just so it's clear before we move on, this lunch break time ultimately got caught up and you got paid, didn't you?

A. He paid me for some of it, but not all of it.

Q. Well, if 1 go through your records here, is there going to be documentation that shows me the amount of lunch periods that you claim you never got paid for?

A. From the time that he's been there?

Q. Well, I thought we were now talking about the spring of last year.

A. Oh, I thought we was talking about all of them, because there would be documentation where he never paid me for. If you go through from the time he's been there, there will be documentation that he didn't pay me for lots of them. So I thought that's -- I'm sorry. I got it mixed up.

Q. Well, no, I think you've opened up -

A. Yeah.

Q. -- something broader, larger.

A. Yeah.

Q. You're telling me now that over a long period of time, you turned in to the chef missed -- well,

not missed -- you turned in to the chef the time you should be paid for because you worked through an unpaid lunch? Yes?

A. That's correct

Q. And I don't know to what degree, but with some regularity, you didn't get paid that, and it never got caught up or adjusted --

A. That's correct.

Q. -- as a bookkeeping error? And when is the first time you ever made the university aware of that?

A. And it's probably my fault. I'll tell Bill, and I trusted that he would fix it. Or I will tell the timekeeper, which is Lisa Fordyce (phonetic), but she only does what he tells her to do, so it's probably my fault that I didn't --

Q. When is the first time -- is it this paper here?

A. No. It's before that time.

Q. Before that time, you filed a complaint with the --

A. No.

Q. -- university that you --

A. No, I didn't file a complaint.

Q. -- were owed pay?

A. I didn't. I just worked through them, and I just didn't get paid for them.

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Q. And you just let it go?

A. Pretty much. And it's probably my stupid error.

Q. How many times did that happen before this, meaning these events here --

A. Lots of times.

Q. -- in April? What's "lots of times"?

A. More than five. More than ten.

Q. With respect to the timekeeping that you're talking about here in Exhibit G, as I understand your testimony, you're telling me there are still some lunch breaks you worked that you never got paid for, right?

A. That's correct.

Q. How many of them?

A. During the duration of -- oh, in --

Q. Now.

A. Now?

Q. Yes.

A. I don't know. It's probably one or two maybe. I don't know. But --

Q. Did you ever point that out to anybody after you had made it the subject of an official complaint --

A. I didn't make an --

Q. -- that, I haven't been made whole?

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A. I didn't make official complaints with anyone except for Bill that he missed this or he missed that. And he'd go, "I'll get it the next time. I'll get it the next time." I didn't make a complaint. I just talked to him as a manager to try to get it fixed there, and I let it go.

Q. Well, university compliance responded to you with their findings and conclusions about the subject matter of this complaint in Exhibit G, didn't they?

A. About -- yeah. He fixed this in this complaint, yes. Maybe if I would have filed a complaint all the other times, maybe they would have, but I didn't.

Q. Well, you filed this complaint.

A. Yes.

Q. You've told me that despite that, there's still some pay you were shorted, correct?

A. I believe there is, yes.

Q. And university compliance, who is separate and distinct from UBC and Bill Kimes, right?

A. Yes.

Q. University compliance is like kind of the employment police out there, right?

A. Supposed to be, yes.

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Q. So you took your complaint to them and they investigated it. They actually came back to you and said, We don't see any reasonable cause for this retaliation complaint you've filed here, this new complaint here, correct?

A. That's what they said, yeah. They told me there was no --

Q. And then you filed another EEOC charge because you were unhappy with --

A. With their findings. That's correct.

Q. During that sequence of events, you didn't point out to university compliance that, Hey, you know, you still owe me some money, some pay?

A. That -- I'm glad you brought that up, because Gloria and I talked in a room, just she and I. And I told her of those things, and she didn't write them in there, that there were other times that he didn't pay me for my lunches. I told her that. She didn't write them in there, but it was just she and I and no other witnesses in the room. So some conversation that she and I had, she didn't write it down.

Q. Has Bill Kimes ever said anything to you that suggested that he had any ill feelings towards you because you're African-American?

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A. He threw up in my face that I was mad because he let Saundra hit me and she got away with it.

Q. Anything other than that?

A. Just kind of stuck me in a corner and told me to do things and I wasn't involved. He showed -- his gestures, he showed me that he didn't really want me to be there, if you would. And I'm -- by saying that, it's like he'll take Brad and Amy and Maria; they'll go places out of town doing different things, and I wasn't involved, included, or asked.

And he'll wait till I leave work, and he'll buy them pizzas and -- you know what I'm saying? It may be trivial to you, but me being the only

black person there for a long while, that's -- it kind of put me on that scale that he didn't like.

Q. How many employees are there? Are there like 20 or 30 in UBC?

A. No.

Q. More?

A. No. That's just -- oh, are you counting students?

Q. Let's exclude the students. How many employees in UBC?

A. Well, there's about like six of us in the kitchen, or seven, and then there's probably about three

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waitresses, three or four.

Q. Have you ever heard from other employees, similar to like you did with Connie McVicker, that Bill Kimes has any ill feelings towards you because of your race?

A. No, they never told me anything like that. It was just that they --

Q. How about Karen Adkins? Has anybody said, you know, Karen Adkins doesn't like African-Americans and I know that because?

A. No, no. Nobody.

Q. Have you ever heard Karen Adkins say anything to you that suggested that she had any ill feelings toward you because of your race?

A. No. The thing that I -- it went way back to the hitting part when, as I said, they made me demonstrate in the office and they just brushed that over. They just --

Q. You don't like the way they handled that?

A. I totally don't. Because I asked her if the shoe was on the other foot, what would they have done to me.

Q. Has Saundra Davis ever said anything to you that suggested she had any ill feelings toward you because you're black?

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A. I have not talked to her in years.

Q. During the time --

A. Before that, I don't know what provoked her to hit me, and I don't know -- I don't know if she liked blacks or not. She lived in a town that she said they don't see too many blacks.

Q. Well, you worked with her for ten years before that --

A. Yeah. For eight of them.

Q. -- shouting match/hitting incident in 2001. Don't you think --

A. She only --

Q. -- she would have -- let me finish my question. Here we go. Don't you think you would have detected some hostility towards African-Americans if she had any? You're a good enough judge of people to think --

A. Yeah. Exactly.

Q. -- you would have been able to do so? You didn't have any feelings then, did you, that she had any hostility towards African-Americans?

A. I don't know if she hid them or -- because we only talked about how cruel her husband was to her. She really didn't talk.

Q. Have any of your fellow employees ever reported

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that Saundra Davis has said or done something that suggested to them that she has hostile or ill feelings toward African-Americans, similar to what they did with Connie McVicker?

A. No, I can't recall that happening.

Q. Let's go back to Exhibit G. I think the next -- I'm on the page where you've signed it. In the left-hand margin, it looks like April 29th.

A. Oh, right there. Yes.

Q. What's your complaint here?

A. Well, he's always kept it on the -- he came in and told us that the weekends that we work, that's what it's going to be, and he switched the weekends with Saundra and I, and then he switched them back, and just trivial game-playing that he played.

Q. Do you know what reason he may -- did he explain to you what reason he may have had to be switching --

A. No.

Q. -- the times or the shifts?

A. That's because there was a lot of bakery on that weekend, and she usually needs help and I don't. They usually give her help and provide help for her, but I'm made to do all of it by myself. So I

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believe that's the reason why he switched that specific weekend, because it was lots, too much for me to even handle, and I usually take on a lot.

Q. So that weekend was super busy, and chef said they could depend on me to get the job done.

Now, the chef, that's not Bill Kimes, is it?

A. No, that's not. Immediate supervisor, which would be Chef Kelly.

Q. It was Kelly at the time. Did you ever get in a shouting match with Kelly?

A. Not shouting. Yelling at her. She started yelling at me, so -- and I was just, like, voicing my opinion to what she was saying to me. I wasn't insubordinate.

Q. You weren't yelling back?

A. I was talking. She was shouting. She was shouting. And I was just --

Q. And you were just talking --

A. -- talking to her. Yes.

Q. -- in a normal tone of voice?

A. Yeah. You have to remember, there's -- you have to talk loud in there because you got refrigeration and all that. So I was talking, but I wasn't yelling. And there's a difference.

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Q. You were not talking any more loudly than --

A. Than normally, like anyone else.

Q. -- ordinarily, given the --

A. Yes.

Q. -- environment or conditions?

A. Exactly.

Q. And Kelly left and removed herself and went to her office, didn't she?

A. Yeah. And I was getting ready to leave, so I went by her office, and she was upset about something.

Q. You didn't follow her into her office?

A. No, I didn't follow her. I went back to my station. Then I went over to her office.

Q. You didn't resume --

A. No.

Q. -- this --

A. Like hostile --

Q. The shouting match didn't resume in her office?

A. No. I went to her office and I asked her was she all right, because she was out there crying. She was crying, so I went to her office and

asked was she okay. And she said yes. We were talking normally at that time.

Q. You went to her office out of a concern for how she felt?

[100]

A. Exactly. Because she was crying, and plus she was pregnant. I liked her from the beginning and I respected her as my supervisor.

Q. There were no witnesses to -- well, were there any witnesses to what happened before she went into her office?

A. No. I think she and I was the only ones in the kitchen. Bill came later and blocked me from going out of her office. Yeah, I distinctively remember that because I had eye surgery. He put his hand at the door and wouldn't move it so I could go out the office.

Q. In any event, Kelly was the chef that said she could depend on you to get the job done on this super busy weekend of April 29th of 2006, right?

A. That's correct. And she had to end up helping me because it was really ridiculously busy. It was very bad. In my opinion, neither one of us should have been off, and there should have been two or three people over there helping because it was really, really bad. And I could say that being there 18 years. Me saying that is

something. Because I usually can kind of format the day and get it done. But that was really bad. She had to help.

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Q. Now, down at the -- not really the bottom of the page, but at the end of your handwritten narrative on this page, it says: I found Karen -- you mean Karen Adkins?

A. That's correct.

Q. -- to be intimidating by mean-mugging and following me into the dish room -- and then I can't read that -- staring?

A. Is this on the same day? I don't think that was on the same day. Probably the next day after-- no, that was -- no, it was not on the same day.

Q. What does mean-mugging mean?

A. Oh, she came in the dish room and just balled her lips up and frowned her face up and closed her arms up and just looked at me.

Q. Didn't say anything?

A. Huh-uh. And I left on FMLA after that.

Q. There was no conversation between the two of you? You didn't ask her what's up or --

A. No.

Q. -- what's wrong or anything, and she didn't say anything?

A. I think she knew.

Q. You just didn't like the way she looked at you?

A. I think she knew.

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Q. But, I mean, that --

A. We didn't have a conversation.

Q. You didn't like the way she looked at you?

A. Because she was in the kitchen, and then she followed me into the dish room and stood there.

Q And Karen would have been actually Bill Kimes' --

A. Supervisor.

Q. -- supervisor at that time, correct?

A. That's correct.

Q. Okay. Look at the next page. Is this all your handwriting?

A. Yes.

Q. Up at the top, it says 3 of 3. Even though the last one has the signature and I would ordinarily think it would be the last page, it looks like this is the way --

A. I don't know who put them in that order.

Q. Well, there is a May 5th date, so chronologically, since we were looking at April, maybe this is the order.

But anyway, in the first paragraph up there, down to where it says Friday, May 5th of '06, is all of this a continuation of something we've already talked about, or is this different?

A. Susan Sowers, I believe this has something to do

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with -- is her name mentioned? Yeah, Susan. This probably had something --

Q. Well, this says: Waited a week before they called the witness to the office to ask her what she saw.

And that was Susan Sowers?

A. Yeah. I'm trying to figure out what --

Q. Regarding Saundra and the blocking of the elevator incident.

A. Right. Yeah. Well, Susan told me that Bill wanted to see her that day that it happened, but then he waited to talk with her a week later.

Q. All right. This is about what happened to Susan then.

A. He was wanting to talk to her about the elevator incident since she was a witness to it, and then the other stuff that transpired with her.

Q. Have you talked to Susan in the last year?

A. I've talked to her to see how she's doing. She was a pretty good person. She's another one that said that Connie was calling me the N word.

Q. Okay. Then there's this event on May 5th, graduation day: I was working -- tell me about that. What's your complaint with what happened on May 5th? This would be 2006?

A. Oh. Yeah, I was left there, and the rest of them

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was -- yeah, I remember that Butch was there.

Q. Who is Butch?

A. Parker. He was the black guy that they hired at the end of 2005.

Q. Okay.

A. He found it odd because first they denied him, and then they told him that he could work.

Q. Well --

A. Anyway, I was left at the student center doing whatever I was asked to do, and Saundra was there, which I never felt comfortable being around her. There was always someone around us. I just -- after the -- what happened, I just don't feel comfortable around her. I just don't by myself. And something happened with some milk, I believe. Is that what that is?

Q. You have to tell me. I don't know.

A. Let's see. (Witness reviewing exhibit.)

Q. Something must have happened here that you deemed important enough to write it out in this document that you were filing --

A. Yeah, Lisa stayed -- right.

Q. -- a few days later with university compliance.

A. Lisa stayed there with me, and Connie and Saundra were there pretty much. And I wasn't in the

bakery area, but they needed -- they wanted me to make like 500 biscuits or something that day, and we didn't have milk. So Butch went to the store and got the milk, and Saundra, like, came and slammed them on the counter real hard. And that made me leave out of the kitchen pretty much.

And I just -- I went and got Lisa and -- Lisa Fordyce, which is the supervisor. So she came down there. Pretty well much had to have someone in the kitchen when she -- or Connie or either of us were in there by ourself. Bill was not leaving us alone. But that day, specific day, they were -- both of them were there and I was there.

One of them went to the store to get milk. Either it was Saundra -- or not Saundra -- Connie or Butch, but Butch was there to witness her slamming the milk down and not putting it in the refrigerator, because I had left. I left work, I believe. It looks like there's some more paperwork to this.

Q. Well, I mean, tell me --

A. Yes.

Q. -- what is there about what happened that day that, in your view, I guess, is evidence of --

A. Intimidation.

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Q. -- retaliation.

A. Yeah, I felt intimidated by Connie and her staring, once again.

Q. Slamming the milk?

A. No. Both of them coming in there staring at me together and slamming the milk down as hard as she could. And that was just not right. And looking at me as she was slamming it to the counter.

Q. Saundra Davis?

A. Yes.

Q. Neither one of them said anything?

A. No. Just through gestures.

Q. And Butch Parker was there?

A. Yeah. He saw them doing it. He saw that. And he -- yeah. So I went and got Lisa.

Q. Anything other than that?

A. That day, I think that was it, because I left. I believe that was all.

Q. All right. You filed another charge of discrimination alleging retaliation then that summer, didn't you, with the EEOC?

A. I believe so.

MR. SHOCKLEY: Let's mark that.

(The Court Reporter marked a document for identification as Defendants' Exhibit H.)

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Q. Is that your signature?

A. Yes.

Q. It looks like on August 10th of 2006?

A. Yes.

Q. And this makes reference to your previous EEOC charge that's in evidence that we've looked at, and then it makes reference to Exhibit G that we've just been talking about, and then it says that you've been subjected to ongoing retaliation by the supervisors in the form of intimidation, racial harassment, hostile environment, and other.

So this is like three months after Exhibit G. Can you tell me what other specific things or events, if any, happened to you after May 10th, when you filed this with university compliance -- "this" meaning Exhibit G -- and you filed Exhibit H with the EEOC? There's about 90 days in there. What else happened?

A. Just the ongoing glares and the things that they were doing, the mumbling with Connie and just the -- being in that environment. I just don't understand why they couldn't have -- I don't understand why they even brought Saundra back over there, and I don't understand why they continued to keep Connie there is the reason why. And you

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have to live through that every day and work, because we all have to work, and I have to be -- I have to continue to work in that environment.

This is the point that I was trying to make. It's every day that I come to work. It's just something you have to be faced with every single day. And I don't know why that was or why did I have to continue to look at them doing what they're doing. They're not going to say anything after all this has been printed, but it's just them being in there and the looks and the glares and the -- just being around that. It's just not right. And I just felt like they weren't doing anything about it, enough to --

Q. What would "anything about it" mean to you?

Maybe another way to ask that question is what else, in your view, should the university have done?

A. From the beginning?

Q. Well, I don't know when the beginning is. You'll have to tell me --

A. From the beginning --

Q. -- what you mean by that.

A. -- from all of it, I shouldn't have been hit. I shouldn't have been called monkey. I shouldn't

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have been subjected to that kind of environment. I shouldn't have to be belittled, treated differently from my other co-workers, I just feel like. And then there's no black person that wanted to stay there because he did some things to them that made them not be able to take it.

Q. Wait a minute. Wait a minute now.

A. Uh-huh. There were other blacks there that quit.

Q. All right.

A. Yes.

Q. Let's talk about that.

A. Yeah.

Q. When, first of all?

A. I'd have to pull up the records.

Q. Well -

A. At some time during Bill's stay there.

Q. I'm going to give you a time frame in this case.

A. Okay.

Q. You filed your first complaint with the university, and then the EEOC in November -- the university in November of '05, the EEOC in January of 2006. Okay? So in 2004, 2005, 2006, or --

A. Previous.

Q. -- what other African-Americans have been in UBC and quit, as you said?

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A. There was none in 2004. In 2005, after the complaint came out and everything with Gloria Courtright, she asked Bill, "How many blacks are working there?" He said, "None." And so Butch --

Q. And it's six people, I think you told me?

A. Excuse me? I'm sorry.

Q. Well, earlier I was mistaken about the number of employees in there, and you --

A. Oh, of the --

Q. -- corrected me. I thought it was 15 or 20, and you said, No, it's five or six --

A. No.

Q. -- plus three waitresses.

A. In the kitchen, it was like six people in the kitchen, three or four waitresses. It wasn't 30. I think that's what you were saying.

Q. So it was six, and if you count the waitresses, it's nine or ten?

A. Or something like that, yeah. It wasn't 30 people.

Q. And that includes you?

A. That includes me, yeah.

Q. So one out of six or one out of nine or ten?

A. One of --

[111]

Q. One African-American?

A. Right.

Q. Okay.

A. But in 2004 there was no African-Americans. In 2005 there was no African-Americans except--well, in October he hired Butch.

Q. October of 2005?

A. October. I'm not really specific on the date in the month. But Butch did tell me that they declined his application to work over there. And once Gloria and Bill and myself went into the room to discuss the matter of what's going on in there, she asked him how many black employees did he have. And he said --

Q. And you're now telling me not what Butch told you, but what --

A. Gloria and Bill.

Q. -- Gloria and Bill Kimes talked about?

A. We're talking about the ratio there, the blacks --

Q. Are you telling me this because Gloria -- you're claiming Gloria told you this?

A. No. Gloria asked Bill.

Q. How do you know that?

A. I was sitting there.

Q. In your presence, Gloria asked Bill?

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A. Yes. "How many blacks do you have employed?"

Q. Okay.

A. And he said, "None."

Q. Except you?

A. Except for me. One. Yeah. And then --

Q. Well, what do you think would have been a representative ratio or -- I mean, to reflect the Ball State workplace, the demographic statistics in Muncie, how many African-Americans out of a group of six or ten should there have been?

MR. KRESS: Objection; assumes facts not in evidence; asks for a legal conclusion. You can answer if you're able.

A. I don't know. But I felt like, you know, they were quitting --

Q. In any event, Gloria asked Bill how many other African-Americans in addition to Maetta; he said none?

A. None.

Q. So tell me what --

A. And so he -- that Monday or a few days later, they hired Butch. After they told him they wasn't going to hire him, they hired him.

Q. Who told you that?

A. Butch Parker did.

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Q. Butch told you he was hired?

A. Yeah. He said, "Wow, that just quick. They just declined" -- they denied him, and then she hired him.

Q. So that's in the fall of 2005?

A. Yes. And then they hired another young guy. He's a student. And they both quit. They're not there anymore.

Q. Where is Butch now?

A. Butch couldn't take it. He's at the atrium.

Q. So did he bid for a job at the atrium?

A. Yes. He bid out because he couldn't -- in his words --

Q. In his words, he couldn't take it?

A. Well, something -- yeah. He was like -- Bill would -- you'd have to ask him how he feels.

Q. Why don't we just ask Butch about that.

A. Right. Yeah.

Q. So he's at the atrium now?

A. He bid to the atrium. I saw him.

Q. Is he a part-time employee there?

A. No. He's full-time.

Q. Was he full-time at UBC?

A. Yes. He was a custodian, I believe. Yeah, he was custodian, slash, truck driver. He worked with

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Connie. And they had --

Q. What's he doing at the atrium?

A. I don't know.

Q. What's his rate of pay?

A. I don't know. He doesn't work in the same building.

Q. Did he take a cut in pay to go to the atrium?

A. I don't know what he makes.

Q. All right. In any event, he bid for a job at the atrium; he's there now, so far as we know?

A. Yeah.

Q. Anything else? Any other African-American employees --

A. Ahmed.

Q. -- that have left UBC, I guess, since 2004?

A. Ahmed, the other black student. All I know is Ahmed. He should be on one of those schedules.

Q. Well, I thought we weren't going to talk about students, but all right. Is he the only African--

A. Right.

Q. -- American student --

A. In the kitchen. Right.

Q. -- employed at UBC?

A. Right. Since then, yes.

[115]

Q. What was his name?

A. A-H-M-E-D, I believe. It was -- Ahmed is how I can say it.

Q. Do you know his last name, or is that his last name?

A. I don't know, but he wanted us to call him Ahmed.

Q. Do you know where he is now?

A. He works in the village, I believe, because he was working -- he works, I think, at Scotty's, I believe.

Q. He was, as a student, a part-time employee at UBC?

A. Something like that. He worked in the kitchen. But there was another African-American girl asked to come back, and Bill wouldn't let her because she was --

Q. What's your basis to say that?

A. Well --

MR. KRESS: Object to the form; argumentative.

A. Well, she was asking me --

Q. What's her name?

A. Greta May.

Q. Is May her last name?

A. Yes.

Q. And so tell me what Greta May told you.

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A. She came in there. I saw her. It was around 2004 or maybe the end of 2003, one of our busy times. And she was previously employed there, and she asked Betty could she -- "You guys need any help?"

And she said, "Yeah. We're super busy. Go ask Bill could you come back or whatever." And he said no, but he hired whites after that, so that's the conclusion I come up with. And she was already trained to do that kind of work, and he wouldn't let her come back.

Q. She's a student?

A. No. She's an adult employee.

Q. Okay. Is she employed at the university now?

A. No, she's not.

Q. When is the last time you spoke to her?

A. I see her at the grocery store. I think I spoke with her a week ago.

Q. So you see her frequently?

A. No. I just -- in passing, I might see her at the store occasionally. I don't -- because she does what she does and I work. So we -- I don't visit

her or anything. I just know of her. I've been knowing her for years.

Q. You've known her around the Muncie community --

A. Right.

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Q. -- for years?

A. Yes. And she's worked for the university in different departments.

Q. Okay. And you may have said this. I apologize. I don't mean to ask you to repeat yourself. Was she a university employee when she came to UBC to ask if they needed help and --

A. Well, now, that part I'm not clear on, if she went to human resources. I think she said she did, but I'm not for sure. I'm sure she would have because she knows you have to go there before you -- you just can walk in there and get a job, basically.

Q. I'm aware that some things happened or are alleged to have happened in April of this year at UBC involving yourself and Connie McVicker. We'll talk about that in a second.

A. Okay.

Q. But let's try to fill in the gap here from when you filed the EEOC complaint, which I think was August 10th of 2006, for retaliation, Exhibit H, and then April.

Did anything else happen since this EEOC complaint in August of 2006 that you think is evidence of a racially hostile environment at UBC? Before we get to these late April events with

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Connie McVicker, anything else in that eight-month period?

A. Not that I can think of right offhand.

Q. Tell me what happened -- well, first of all, before these events in April, Connie McVickers job changed, did it not?

A. This past April?

Q. Well, prior -- in late April, you and her had some kind of run-in, and we'll talk about that, but by that time, she was not a truck driver at UBC anymore; she was doing something else, wasn't she?

A. Oh, yeah. They put her downstairs, which is still dining service. They took her from a truck driver's position and made her a custodian, yeah, because the girl Tanya bidded out to

something else. So when -- I think it was on a Saturday. I can't remember the exact --

Q. Let me stop you there. How did you learn that Connie McVicker was not assigned to UBC anymore and now had this job as a custodian for dining services? How did you find that out?

A. People just -- that's how I find out everything. Bill didn't tell me. And then you seen her -- one day she went downstairs. Just people just listening to people's conversations.

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Q. Downstairs in the student center?

A. Listening to people --

Q. No, I'm sorry. Connie McVickers --

A. Yeah.

Q. -- job location --

A. In the same building, in the same area, as I. Because I have to be down there, upstairs, in the basement, everywhere. That's our job, is to go.

Q. Well, she's not assigned to UBC backing her truck up, loading up stuff that you've baked in the presence of --

A. Or something.

Q. -- or on a regular basis?

A. Yes.

Q. But she's in the same building?

A. That's correct.

Q. On a different floor?

A. That's correct.

Q. And it's a pretty big building, is it not?

A. It's a big building.

Q. But I think you just told me that your job requires you from time to time to go down to that floor where she is, and I'm not sure if you told me why you need to go down there.

A. Yeah. Because we have a food storage freezer down

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there. We eat lunch down there. And we fix chicken salad items. We cook for them because they're not allowed to cook certain things or to make certain things. They just -- anyway, when we run out of things, we have to

ask them to borrow things. So that's part of my job.

Q. Who is "they"?

A. They is --

Q. Dining hall services?

A. As being -- they call that -- what is the name of that? Food court. That's the name of it. That's where Connie works. In the food court.

Q. She's a custodian, though?

A. Yes, she's a custodian there.

Q. You don't have to ask her for things, do you?

A. Huh-uh. No, I --

Q. So does it -- I'm sorry. Go ahead.

A. I have to ask her supervisor, which is Tina Swift (phonetic). And if we running out of things, we borrowing stuff constantly, all the time, and we're down there constantly, all the time, for one thing or the other. We've run out of stuff. Got to go to the freezer. You have to go get your lunch. You have to -- just back and forth. And that's how I seen her more now than I did when we

were upstairs from the beginning of all this, because she's -- that's her -- that's where she works at, and that's also where I have to go. So I'm constantly passing her all the time. I'm just trying to give you a visual.

Q. Your path to the freezer, does that require you to go past her workstation?

A. That's what I didn't know, where's her workstation.

Q. You don't know where her workstation is?

A. I do know because John Lewis (phonetic) told me her workstation is right by the door that you go out into the food court where all the people are. And her workstation is also back by the freezer where I have to go to get my items for the day. Her cart where she goes to take out to the dock to put the items on is right there.

Q. Well, if she's a custodian, I guess --

A. Yeah, she's everywhere.

Q. -- her work area might be --

A. The whole thing.

Q. -- that whole floor or that part --

A. It is.

Q. -- of the building? But the two of you are not required to work together to make the same project

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a success anymore like you used to be, right? You would bake; everybody else would contribute; she'd load it up and take it to the site; the two of you don't have to work together anymore?

A. No.

Q. But you may run into each other?

A. A lot.

Q. And in the course of that, apparently something happened?

A. That's what they said.

Q. No, no. I mean, you made a claim --

A. Yeah.

Q. -- or a charge that something happened, didn't you?

A. No. That was -- she was still working for us upstairs at that time. As my recollection, she was still working for UBC. And it happened in the basement.

Q. Oh, okay. You're aware that McVicker made a claim against you, right?

A. Yeah. After I made the claim about the basement. They didn't even address that.

Q. That may have been her first day in her new job, I guess. Maybe that's where I got that.

(The Court Reporter marked a document for

[123]

identification as Defendants' Exhibit I.)

Q. Now, Ms. Vance, in front of you, I have placed what we've marked as Exhibit I. Is that your handwriting?

A. That's correct.

Q. And is that your summary of, it looks like, on April 21st of '07, your complaint about Connie McVicker that occurred on that date?

A. Yes.

Q. And the two of you encountered each other in the basement, and she said to you, "Payback"?

A. Yes. I was --

Q. Did she say anything else?

A. I was getting on the elevator. She was getting off the elevator. And she turned around and pointed, "Payback," and that was it. And I went upstairs and called Bill Kimes and told him, and he in turn told me to tell Lisa and to make a written report on that. And --

Q. Did you say anything back to her?

A. No. The door was closing.

Q. Did you encounter her the following Monday, which I guess would have been the 23rd, and say anything -- well, two questions, I guess. Let me back up.

[124]

Did you encounter her on May 23rd -- I'm sorry -- April 23rd? And let me just ask you that first and break it down.

A. Did I encounter her?

Q. Yes.

A. I saw her.

Q. Did you say anything to her?

A. No.

Q. Where did you see her?

A. Down in the food court.

Q. Do you remember where in the food court?

A. I saw her from a distance. She was on the dock. I saw her by the freezer. I saw her by one of the workstations she works at. She's -- that was the first thing and I -- I seen her a lot that day. I saw her, yes. She looked at me and was laughing and grinning like she usually does, making faces.

Q. Did you say anything to her in the nature of, You better watch your house?

A. No, I didn't.

Q. Or, This is just the beginning, bitch?

A. No, I didn't.

Q. Did you ever call Saundra Davis an evil bitch?

A. Yeah, that's what she said. I didn't say that either. That was the elevator incident

[125]

Q. Right. Right. I didn't mean to suggest that that was at this time. I just -- I remembered that claim.

So going back to the 21st, Maetta said, "Payback" -- I'm sorry -- Connie said, "Payback," and she didn't say anything else, right?

A. Yeah. Then they got off of that, and then all of a sudden, they said that I told her to watch her house. They never even finished this one. They jumped to the Monday.

Q. What do you mean "they"?

A. John Lewis and Karen Adkins came over to question me about me being down in Connie's work area.

Q. Well, do you know whether or not they questioned Connie about your --

A. I don't --

Q. -- charge?

A. Oh, yeah. Because -- yes, they did, because Les Richardson (phonetic), which is the president of the union, since I'm in it now and I have been in it for the last couple months, I said, "Well, I need for you to" -- because Karen Adkins made the statement that she'll need to talk to me. I didn't know what for. And he said, Well, he's representing Connie

now because she said she wasn't going to call me the N word anymore, so now they have to represent her and I need to get someone else to represent me. But previously, Tim, which is another union rep, told me there's nothing that they can do for me; I'd be better off going to the EEOC.

Q. Anything other than or, for that matter, since - it's been almost a month -- since these events in late April that's happened to you at your job that you believe is evidence of a hostile work environment?

A. Then we go back again to that (indicating).

Q. To what?

A. Well –

Q. I'm not sure what you meant.

A. The salad area.

Q. Well, you've already told me about that, that that --

A. And no one to talk to, no one to --

Q. -- continues to be your assignment.

A. Right. Everybody is grouped off, but I'm alone over there with my back toward people, and no one is allowed to help me. So I think that's --

Q. What do you mean no one is allowed to help you?

A. Because students will come in, and I'm nice and

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cordial to them and ask them, "You guys need something to do?" As it states, I'm supposed to be over the part-time people and over the students. And they'll be like, "Yeah. What do you want me to do?" And I'll go gather some items and come back, and someone else be done told them something else. The chef be done pulled them. And that has happened four or five times, so that's an indication.

Q. Was there someone in this position before you? Who made the salads before you?

A. Susan, a substitute. Salad was the first place that you usually go when you come in the kitchen. It's a sub's job.

Q. Susan Sowers that you've told us about?

A. Yeah. She worked over there for three years.

Q. Well, Susan got let go --

A. Yeah.

Q. -- in the spring of 2005, didn't she?

A. That's correct.

Q. So after she got let go until you started in --

A. Students.

Q. -- January of '06, who made the salads?

A. Students.

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Q. The students did?

A. Yeah.

MR. SHOCKLEY: All right. We said we'd take A break now. Let me just visit with Shawn. I think I'm very close to being done, and we might be able to wrap this up in five or ten minutes.

(AT THIS TIME THERE WAS A RECESS, AFTER WHICH THE PROCEEDINGS WERE CLOSED.)

AND FURTHER THE DEPONENT SAITH NOT.

/s/
MAETTA VANCE

* * *

VERIFIED STATEMENT OF JULIE MURPHY
Dkt. No. 62-9

VERIFIED STATEMENT OF JULIE MURPHY

I, Julie Murphy, being duly sworn upon my oath, make the following statements based on my own personal knowledge:

1. I am over eighteen (18) and competent to testify herein.

2. I worked approximately ten (10) years in the banquet and catering department at Ball State University, and worked closely with Maetta Vance during that time period.

3. I no longer work in the banquet and catering department at Ball State.

4. While I worked at Ball State, I heard Connie McVicker use the "N" word on several occasions.

5. When working with Connie McVicker and Maetta Vance, I heard Connie McVicker use the "N" word specifically referring to Maetta Vance.

6. Ball State was aware that Connie McVicker used the "N" word in reference to Maetta Vance, and did not take any action to separate Connie McVicker from working closely with Maetta Vance.

7. Connie McVicker informed me and other employees at Ball State University that Maetta needs to be careful because Connie McVicker had relatives in the Klu Klux Klan.

8. There were other employees who have treated Maetta Vance in a hostile fashion at Ball State, including Saundra Davis and Bill Kimes

9. Due to Ms. McVicker's statements and Ms. McVicker, Ms. Davis and Bill Kimes' treatment of Maetta Vance, the atmosphere at work was very uncomfortable as you could feel the tension in the air

10. Bill Kimes was aware that I had a good working relationship with Maetta Vance.

11. Bill Kimes treated me differently and was hostile to me because I had a good relationship with Maetta Vance.

12. For example, Bill Kimes reduced my hours to 32 hours when I previously had been working 40 hours.

I verify under the penalties of perjury, that the foregoing statements are true and correct.

FURTHER AFFIANT SAYETH NOT.

5-29-07 /s/

Date Julie Murphy

VERIFIED STATEMENT OF
PATSY AMOS
Dkt. No. 75-25

* * *

VERIFIED STATEMENT OF PATSY AMOS

I, Patsy Amos, being duly sworn upon my oath, make the following statements based on my own personal knowledge:

1. I am over eighteen (18) and competent to testify herein.

2. I have worked in the banquet and catering department at Ball State University for approximately 10 ½ years.

3. During that time, I have known Maetta Vance, and have worked with her.

4. I also know Connie McVicker, a truck driver for the banquet and catering department, and have worked with her.

5. In August 2006, I started working in the kitchen in the banquet and catering department of Ball State University.

6. As a result of this transfer in August, 2006, I began working more closely with Maetta Vance.

7. In working with Connie McVicker, I heard Ms. McVicker refer to Maetta Vance as a "porch monkey".

8. After being transferred to work in the kitchen, Bill Kimes, the manager of the banquet and catering department, had a meeting with me in his office and stated, "I see you have some new friends".

9. I interpreted his comments referring to Maetta Vance and did not understand why Mr. Kimes would be interested in my relationship with Maetta.

10. While working at Ball State University, I have noticed the treatment of Bill Kimes, Saundra Davis, and Connie McVicker to be hostile towards Maetta Vance.

11. At the present time, there is not a good working atmosphere in the kitchen department at the banquet and catering department due to the tension that is caused by Bill Kimes, Saundra Davis and Connie McVicker's treatment of Maetta Vance.

12. I was told by Tim of our union that they could not assist with a grievance I had against Ball State because I was "guilty by association" based on my relationship with Maetta Vance.

I verify under the penalties of perjury, that the foregoing statements are true and correct.

FURTHER AFFIANT SAYETH NOT.

5/29/07	/s/
Date	Patsy Amos

DEPOSITION OF WILLIAM KIMES
Dkt. No. 75-21

* * *

[5]

STATE OF INDIANA)
JSS:
COUNTY OF MARJON)

CERTIFICATION OF CERTAIN QUESTIONS

I, Janine A. Ferren, RPR, CRR, CSR No. 93-R-1028, a Notary Public for the State of Indiana and Court Reporter maintaining an office in Hamilton County, Indiana, do hereby certify that upon advice of his counsel, the deponent herein refused to answer the following question(s) as posed to him by counsel for the Plaintiff:

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Q If she used the N word towards Vance again, would she be suspended?

* * *

These matters are now referred to the Court for disposition pursuant to the Federal Rules of Civil Procedure.

/s/
Janine A Ferren
RPR, CRR, CSR No. 93-R-1028

My Commission Expires:
April 22, 2008

County of Residence:
Hamilton

[6]

WILLIAM KIMES,

having been duly sworn to tell the truth, the whole truth, and nothing but the truth relating to said matter, was examined and testified as follows:

DIRECT EXAMINATION,

QUESTIONS BY MR. DAVID E. KRESS:

Q **Please state your name for the record.**

A William Kimes.

Q **Mr. Kimes, my name is David Kress, I'm an attorney for Maetta Vance. You're here for your deposition in a lawsuit filed by Maetta Vance. Are you familiar with that lawsuit?**

A I am.

Q **Have you ever had your deposition taken before?**

A No.

Q I'm going to explain a few ground rules that will hopefully make it easier today.

A Okay.

Q I'm going to ask a series of questions. Please let me try to finish my question before you answer; is that okay?

A Yes.

Q It's sometimes difficult, if we're having a conversation that's not being recorded, you'll

[7]

know where I'm going, you'll kind of cut me off. It makes it very tough when she's typing everything.

A Understood.

Q Please try to give all your answers audibly. Head shakes, head nods, don't come out well on paper. Do you understand?

A Yes.

Q If you don't understand a question, please let me know.

A Okay.

Q If you answer a question, I'm going to assume you understood it; is that fair?

A Yes.

Q Where do you live currently?

A Are you asking for the address?

Q Yes.

A 940 North Graham Avenue, Indianapolis, Indiana.

Q And you work at Ball State?

A I do.

Q You commute daily?

A I do.

Q How old are you?

A 41.

Q How long have you worked at Ball State?

[8]

A Since 1999, February. I'd say that's -- if I do the math correctly, that's eight years, eight and a half years.

Q Where did you work prior to that?

A I worked for a small catering company called Pat's Perfections. It was owned by Pat Wright who has since recently passed away.

Q How long did you work there?

A I worked there for approximately a year.

Q Okay. Where before then?

A I worked for Crystal Catering. I worked actually in Muncie, though, for Crystal. I know Crystal is an Indy-based company, but they took care of the Horizon Center I worked there.

Q Okay. How long?

A Approximately maybe two, three years, approximately.

Q Where before then?

A For Marriott Corporation; prior to Marriott/Sodexho.

Q Was that also in dining/catering?

A It was.

Q How long have you worked in dining/catering field?

A My entire career, for approximately 22 years.

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Q Do you have a degree in – I'm not sure what it would be called.

A I have a food management degree.

Q When did you get that?

A I want to say approximately '96 is when I actually received my degree.

Q From where?

A Ball State.

Q But your entire working career, other than summer jobs in high school and those type of things, has been in food management?

A Yes, even those were.

Q Okay, so even beyond that, okay. At Ball State you have management responsibilities; correct?

A Yes.

Q What are those?

A I oversee the workings of university catering -- University Banquet and Catering, and the Cardinal Crossing Food Court within the student center dining operation.

Q When you say "oversee," what does that entail?

A I oversee the budget, I oversee the administrative duties, I manage -- help manage because I have a management team.

[10]

Q What are the administrative duties?

A Dealing with clients, making sure the budget is
in line, making sure employees are doing what they're supposed to be doing.

Q You supervise employees?

A Some. I supervise supervisors more now, but yes, I do supervise employees.

Q Has that changed recently? You said "now."

A No. I've been delegating a lot more.

Q Since when?

A For the last couple of years, I'd say maybe last three or four years.

Q How many employees are you in charge of now in University Banquet and Catering?

A Counting supervisors?

Q Yes.

A Counting students?

Q Yes.

A Approximately 50.

MR. SHOCKLEY: I'm sorry, 50 or 15?

THE WITNESS: 50.

Q About approximately how many of those are students?

A Half.

Q Approximately how many of those are supervisors?

[11]

A Two supervisors.

Q **Who are they currently?**

A Lisa Fordyce.

Q **And?**

A Anna Lisa Padron.

Q **I'm going to refer to University Banquet and Catering as UBC. That's an acronym I believe that's used at Ball State; is that fair?**

A That's fine.

Q **Where does it fit in the hierarchy? What's above UBC?**

A Ball State Dining.

Q **Is UBC a division of Ball State Dining?**

A Yes, you could say that.

Q **I mean, is it accurate to say that?**

A It is.

Q **Who is your direct supervisor?**

A Currently my direct supervisor is Karen Adkins.

Q **How long has that been the case?**

A Approximately a year, year and a half.

Q Who was it before then?

A Ann Talley.

Q Does Karen Adkins do the same things that Ann Talley did?

A No. Karen's title is assistant director, and

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Talley's title was director.

Q Who is the director now?

A Jon Lewis.

Q So there's another layer of management in between in the last year, year and a half? You used to report directly to the director, now you report to the assistant director?

A Yes.

Q Did you do anything to prepare for this deposition?

A I tried to read through the file.

Q What file?

A Maetta's personnel file.

Q You looked at Maetta's personnel file?

A I did.

Q Anything else?

A Not to my knowledge, no.

Q Did you meet with your attorneys?

A I did.

Q How many times?

A Twice that I recall.

Q When was that?

A One today. One was -- I don't recall the date.

Q Approximately. I'm just trying to get a time frame.

[13]

A This was actually postponed, this meeting was postponed. I want to say we met approximately a week prior to the initial date.

Q How long were these two meetings?

A Brief, maybe half an hour to an hour tops.

Q Each of them?

A Yes.

Q Did you look at any documents other than Maetta's personnel file?

A Not to my knowledge, no.

Q I'm not sure what you mean, not to your knowledge. Do you not remember?

A I don't recall looking at any, no. Just what was in her personnel file.

Q You had gone through your duties earlier. Are you in charge of hiring?

A No.

Q Who hires UBC employees?

A Karen Adkins.

Q Do you interview anybody?

A I have helped interview management staff, yes.

Q Who is considered management staff?

A Lisa Fordyce, Anna Lisa Padron. The chef, Shannon Fultz.

Q **Is the chef and Shannon Fultz the same person**

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or –

A Yes.

Q **Only management, did you help interview other employees?**

A I helped interview my bookkeeper and secretary.

Q **Who are they?**

A Teresa Rector is my secretary, and Pam Poti is my bookkeeper.

Q **How long have they been at Ball State?**

A I don't know how long they've been at Ball State. They've been with me, both of them, approximately three to four years.

Q **Are you involved in the hiring process at all if you don't interview?**

A I'm sorry, can you --

Q **You said that Karen Adkins does the hiring. Do you just walk in one day and**

there's a new employee standing there and you have to figure out who it is?

A No. She'll call and say, "I found in the interviewing process," maybe their credentials would say, "I'm a good fit for university catering, University Banquet and Catering. Do you want them?"

"Okay, sure."

[15]

Q Does she ever ask do you want them and you've said no?

A I don't recall that I ever have, no.

Q So before she hires, she checks with you, though?

A A lot of times, yes.

Q Are there any employees that she's hired that she hasn't checked with you?

A Possibly in the beginning of my career, but that's been so long ago, I can't really remember.

Q In the last five years?

A No.

Q So even if you don't interview them, you have a say on whether they're hired?

A A tad bit, yes.

Q Do you think if you said, "I don't want them," she'd honor that?

A She'd ask me why, and I'd have to justify my reasoning.

Q In your recollection, the last five years there's been no one that she's said, "I want to hire so-and-so," and you've said no?

A Correct.

Q **You've approved that?**

[16]

A Yes.

Q She's the one – who gets the applications?

A Karen Adkins receives the application from human resources.

Q Did do you know who gets them in human resource?

A I do not

Q **Is that a separate office completely?**

A Yes.

Q **Is it located near University Banquet and Catering?**

A Human resources?

Q **Yes.**

A It's across the street in the administration building.

Q **Different building?**

A Yes.

Q **So Karen Adkins' interfaces with HR?**

A Yes.

Q **And does some interviewing and calls you and says, "I've got someone I want to hire"?**

A Sure.

Q **And you've said "yes" every time she has somebody?**

A Yes.

Q **Do you see the people she rejects?**

[17]

A No.

Q So there's people out there that apply and make the cut and you don't ever find out about them?

A Yes.

MR. SHOCKLEY: Objection, calls for speculation.

Just for the future, if I object like that, you can go ahead and answer for the record except in the rare instance I advise you not to: okay?

THE WITNESS: Okay.

Q Presumably there's people that Karen Adkins has cut that you'd never find out about?

MR. SHOCKLEY: Same objection.

Q You can answer.

A Probably.

Q You had said you're in charge of Cardinal Crossing, and I think you said University Banquet and Catering. Can you tell me what the difference between those two are?

A Cardinal Crossing is a food court on the first floor of the student center where our operation is. University Banquet and Catering and Cardinal Crossing are lumped together into student center dining.

[18]

Q Okay.

A So for financial reasons. I oversee both of those.

Q Do they operate together or separately?

A They operate together -- I'm sorry. They operate separately but, at the end of the year, the budgets help counteract each other.

Q Financially there's some independence, but on a daily working basis, for instance, Maetta, does she cross over into the food court work?

A Yes. At times she will prepare the market -- the food for the market.

Q I'm making a guess here, so if I'm wrong, let me know. I'm trying to just short-circuit this; instead of asking 50 questions, ask two.

A Yes.

Q **Banquet and catering is more job- oriented that we've got this job coming up, food court is open, I assume, daily or most days, so you've got food preparation for both; is that accurate?**

A Yes.

Q **The food prep people can work on either one, it doesn't really matter, can go in one place or the other?**

A Yes.

[19]

Q **But that's where the separation is. You've got your banquet and catering people, I assume your servers for the banquet and catering events don't help out in the food court?**

A Not normally, no.

Q **You had said that human resources is separate. Do you have any human resources training for the 50 people that you manage?**

A As far as schooling?

Q **Whatever – anything.**

A We go through training every year in the sense of dealing with employee issues.

Q Okay. Who provides that training?

A Employee relations.

Q Is that a division of human resources?

A I'm sorry, I don't know.

Q Do you remember any individuals who supply that training?

A Melissa Rubrecht at times has, who is now the director of employee relations. I would say Sali Falling has at times provided training dealing with sexual harassment, harassment issues.

Q Can you remember any other individuals?

A Karen Adkins, possibly if that's -- Karen

[20]

Adkins.

Q We're a little past halfway through 2007. Have you had any training in 2007?

A Yes.

Q What?

A We went over the harassment issue -- the harassment issues, sexual harassment and, again, dealing with the bargaining unit.

Q For union employees?

A I'm sorry?

Q For union employees?

A Yes.

Q The students aren't union employees, are they?

A No.

Q When did you go over the sexual harassment issues in 2007?

A Our workshops recently concluded. It's been within the last three weeks.

Q Who gave that training?

A I believe Gloria Courtright gave the harassment training.

Q Were there written materials with that?

A There were

Q **Did you keep a copy?**

A I do.

[21]

Q **Do you keep copies of the other written materials? You say you get training annually, if I understand you correctly.**

A I do.

Q **What do you keep those in; one file? How do you separate them?**

A I have a series of files, but I have a binder, like a workshop binder.

Q **Have you had any training regarding racial harassment or racial discrimination in 2007?**

A Yes. That falls partly under the whole sexual harassment/harassment. They've discussed the racial and sexual orientation as well.

Q **Okay, I didn't understand that. They dealt with all in the same training three weeks ago?**

A Yes.

Q **And have you had training regarding racial harassment and racial discrimination annually?**

A Typically, yes.

Q **Explain to me the different positions in University Banquet and Catering. We kind of began talking about it. There's food preparers; correct?**

A Okay.

Q **I'm not going to get into whether you're a cook**

[22]

or cut vegetables. I'm just trying to get into – there's prep people; right?

A Pretty much as far as the service staff are you referring to -- let me back up. Are you referring to strictly kitchen or everybody within university catering?

Q **I'm trying to see what language you use to define it. You have a lot more experience than I did. Ages ago I worked in a number of restaurants. We had back of the house, front of the house, kitchen, then you had front line, then you had people in the back who cut things up and made soups. I'm trying to use what lan-**

guage you use to do that. When you say "kitchen," what does that mean to you?

A Our kitchen staff is broken up to we have full-time, we have part-time and we have substitute.

Q Okay.

A But they're pretty much all the same duties. They're just different levels.

Q Okay. Explain to me, you can use concrete levels. What level is Maetta Vance?

A Maetta is full-time.

Q But you said they do the same duties?

[23]

A They're all production.

Q Okay. But you have to separate. She does different things than someone else, right, to make the kitchen work? Some people bake, some people do other things?

A At times, yes. But they're all given prep lists that identify their duties for the day, and those duties can range anywhere from production of meat and vegetable to finishing an event, and

when I say "finishing an event," you go and put the event out.

Q Okay.

A Does that make sense?

Q It does.

A Okay. To baking, to cleaning.

Q I guess what I– it can change on a daily basis?

A It can.

Q You have a prep list every day, you come in each day, here's the day's assignments; is that accurate?

A It is.

Q Who decides which employee does what each day?

A The chef, Shannon Fultz.

Q Does she have full authority to decide who does

[24]

what, or does she check with you?

A No, she has full authority.

Q Do you have the authority, if you don't think she's running it as efficiently as possible, to overrule her and say, "I'm going to move some people around. And they're going to do this and they're going to do that"?

A I have that authority; I don't know that I've ever done that.

Q You can't remember an instance where you've done that?

A Probably. I mean, for example, this week I needed a delivery made, so our truck driver, you know, I'd consult with her: What are his duties for the day, what do you have him doing, and I need to get this delivery made, that type of thing.

Q So you do sometimes switch around what she's got planned?

A Yes, as the need arises.

Q And you have the authority to do that?

A I do.

Q And she understands that?

A She does.

Q **Going back to your training issues, if someone**

[25]

feels that they've been discriminated against or harassed against in University Banquet and Catering, what are they supposed to do?

A Typically they're supposed to make a complaint.

Q **To whom?**

A They can either make a complaint to a supervisor, myself. They're welcome to go over to university compliance.

Q **So they're entitled to complain to Lisa Fordyce?**

A They are.

Q **And I didn't write down, Anna Lisa –**

A Padron.

Q **To yourself?**

A Yes.

Q **To Karen Adkins?**

A They can, yes.

Q To university compliance?

A Yes.

Q Which that's a separate office; correct?

A It's my understanding, yes.

Q You're not certain?

A As -- I believe it's a separate office. I don't think it falls under human resources, no.

Q Can she complain directly to the director?

A The director Jon Lewis?

[26]

Q Yes.

A Yes.

Q Maetta Vance has worked at Ball State as long as you've been there; correct?

A Yes.

Q You've been her supervisor since you started in 1999?

A Yes.

Q Describe Maetta as an employee.

A Maetta is very concerned about the quality of her work. She's very conscientious in that sense. Her production at times is very high.

Q Anything else?

A She's very punctual.

Q Anything else?

A Those are what come to mind.

(A discussion was held off the record.)

(Deposition Exhibit No. 1 marked for identification.)

Q I hand you what's been marked as Exhibit 1. This is the evaluation for Maetta Vance in February 2007; correct?

A Yes.

Q Is that your signature, the second line on page 3 of the exhibit?

A Yes. Actually that should have been the third line.

Q Okay. But that is your signature?

A It is.

Q And there's ten different areas where Maetta's graded; correct?

A Yes.

Q And she received satisfactories or good in every category?

A Yes.

Q How often do you give evaluations to Maetta Vance?

A In the past couple of years, I try to do them annually. Prior to that not regularly, no.

Q I saw one in her personnel file which your counsel gave to me from 2006.

A Okay.

Q Does that sound right?

A Yes.

Q Before then, do you remember, is that when they weren't done as often?

A Yes.

Q So in 2006 you started doing them on a more regular basis?

A Yes.

[28]

(Deposition Exhibit No. 2 marked for identification.)

Q I hand you what's been marked as Exhibit 2. This is a position description as of August 2001 for catering specialist

A Okay.

Q Do you see that?

A I do.

Q I've accurately described what the document's title is?

A Okay.

Q Is that accurate?

A It is.

Q It says, "Maetta does the same preparation physical work as this position." Do you see that handwritten note at the top?

A I do.

Q Do you know whose handwriting that is?

A I don't

Q Do you know why that note was put on there?

A I don't

Q Did Maetta change positions in 2001?

A No. She was still part-time.

Q Does she have a written position description for her job currently?

[29]

A She does.

Q What is her title?

A Full-time catering assistant.

Q Catering assistant?

A Yes.

Q Do you know looking at – it may have been produced; I didn't see it. Taking a look at this document which was from 2001, are her duties –

MR. SHOCKLEY: Is that what you're asking?

MR. KRESS: Yes.

MR. SHOCKLEY: You can use that if you want, we can make copies of it.

MR. KRESS: Oh, thanks.

Q I hand you what's previously been marked as Defendant's Exhibit A. Does that accurately summarize Maetta Vance's duties today?

A This is her job description of today, yes.

Q Are there any other African-Americans employed at UBC?

A Currently?

Q Yes.

A No.

Q Have there been anytime during 2007?

A No.

[30]

Q So during the entire time of 2007. Maetta Vance is the only African-American that's been employed at UBC?

A Yes.

Q How many African-Americans have you hired since you've been in charge of UBC?

A I don't hire.

Q How many have been hired?

A Several.

Q More than five?

A I'm not sure.

Q If you wanted to find that out, who would you ask?

A I'd probably go to the assistant director of personnel which is Karen Adkins.

Q You think Karen Adkins would be able to answer that question?

A Possibly.

Q That's who you'd ask?

A That's who I would ask.

Q So you obviously assume she'd be able to find the answer? If she doesn't know firsthand, she'd be able to –

A I would hope she'd be able to help me, yes.

Q **You had said "several." Can you remember any**

[31]

names?

A Butch Parker. Then no, I can't.

Q **That's the only name you can remember. When was he employed at UBC?**

A As far as specific dates, I don't know the specific dates. I would have to say within the last three years.

Q **This isn't a memory test, so on dates when you approximate, I understand that.**

Do you remember approximately how long he worked at UBC?

A Definitively, no. I would say a year and a half, maybe.

Q **He's no longer there?**

A Not with university catering, no.

Q **Why did he leave university catering?**

A He bid on another job within dining.

Q **And he received – I'm not sure what the right – he got transferred or –**

A He got the job, yes.

Q **He got the job?**

A He bid on it and got the job, yes.

Q **You had said "several," so you obviously are remembering some individuals who you can't remember their names as you sit here; is that**

[32]

accurate?

A That's accurate.

Q **Are any of those individuals who you're picturing but don't know their names full-time employees?**

A No.

Q **Are any of them – are they all students?**

A I'm sorry, can I back up?

Q **Sure.**

A Butch Parker was full-time.

Q **That was an accurate answer because I meant other than Butch, are there any employees that you're picturing who you can't remember their names, full-time employees?**

A No.

Q **Were they all students?**

A I don't believe they were, no

Q **Some were part-time, some were students?**

A Yes. Can I back up for one minute?

Q **Yes.**

A We do have a student now.

Q **Do you know his or her name?**

A I know her first name is Jahton.

Q **How long has she been there?**

A Less than a month.

[33]

Q **Have you had discussions about Maetta Vance with anyone other than your attorneys?**

A I'm sorry, what type of discussions?

Q Any discussions. Any discussions about this lawsuit?

A No.

Q Any discussions about her employment at Ball State?

A No.

Q Any discussions about the type of job she's doing?

A No.

Q Any discussions about the complaints she's made?

A No.

Q You have in front of you Defendant's Exhibit A which kind of provides all the duties Maetta can perform. What is she doing on a daily basis?

A She does production, food production.

Q Is she baking?
A Has it been on her prep list? Yes.

Q Recently, I mean, this year?

A Without going and looking at prep lists, I can't answer that.

Q Do you maintain the prep list for each day? When I say "you," I mean does Ball State? Are

[34]

those kept anywhere?

A I would have to check with Shannon.

Q You don't maintain them?

A I do not.

Q You don't know if the chef does or not?

A I would assume she did, but no, I don't know.

Q How long has she been chef?

A Since January 2nd.

Q So the beginning of this year?

A Yes.

Q Did the other chefs keep them?

A I don't know.

Q There's nowhere in your office or your workspace where you have a binder or anything with the daily prep lists?

A When I did prep lists, I would keep prep lists, yes.

Q When did you do prep lists?

A When I was without a chef.

Q What time period is that?

A There have been several. In 2006, I want to say from approximately September to December. And then prior to, I believe, in April of 2006.

Q And during those time periods you were the ones that prepared the daily prep lists?

[35]

A I did.

Q And I maintained those in some type of file or organizational?

A I tried to. I can't say that I did every day, but I tried to, yes.

Q Most of them are there?

A I tried to.

Q Are you familiar with what Maetta's been doing on a daily basis?

A I don't look at her prep lists, no.

Q Okay.

A On a regular basis.

Q Do you go through the – calling it a kitchen, if you're calling it a work area, I don't know what you call where they physically work. Do you go through that area every day while employees are working?

A Not always, yes.

Q How often do you go through that area?

A I try to go through once a day, but sometimes it's more, sometimes it's not at all.

Q You go through at least once a week?

A Yes, more than that, yes.

Q So you see each employee is working at – I assume there are stations so each task gets

accomplished. We've got five tasks, we've got to divide it up by five people and get it done. I know I'm summarizing, but is that kind of how it works?

A Yes.

Q So you go through, you see Maetta's working on this, you know, some other employee is working on this. You see that on a daily basis?

A I see that they're working. I don't know the specific activity they're working on or the specific dish, no.

Q Okay.

A I don't pay attention to that, no.

Q Who is Brad Hudson?

A He is a full-time catering assistant.

Q Does he have the same position as Maetta?

A He does.

Q Does he receive the same pay?

A I would believe so, yes.

Q You're not certain?

A Not without checking the --

Q You can find out?

A Yes, I can.

Q But you don't know sitting here?

A Off the top of my head, no.

[37]

Q How long has he worked at Ball State?

A Several years.

Q Longer than you've been there?

A He was there -- if I remember correctly, he was there when I arrived. He left, he left the university, came back, left again and was hired back.

Q Okay. He's left twice since you've been at Ball State?

A I believe so, yes.

Q When was the first time? I understand you're going to approximate.

A I'm sorry, I can't even take a guess.

Q **What about the second time; can you take a guess at that?**

A I cannot.

Q **Has he been back for more than five years?**

A I believe so.

Q **Since he came back a second time, has he been a catering assistant that entire time?**

A He's been a part-time catering assistant, yes.

Q **And that's what he is today?**

A He is a full-time catering assistant.

Q **When did he move to that?**

A The first of January, the same time Maetta.

[38]

Q **Maetta and Brad moved at the same time to full-time?**

A Yes.

Q **Does he do the same duties as Maetta?**

A I don't know what his specific prep list is every day, but he does have the same job description, yes.

Q On a daily basis you don't know what he does?

A I don't pay attention, no.

Q Who does the scheduling for UBC?

A I do.

Q Describe to me how that works.

A How the scheduling works?

Q Yes.

A I take a look at the events that I have for the coming week, and I try and plan accordingly with the amount of staff that I have.

Q Is there a preference for who gets which shifts?

A No.

Q There's no seniority preference?

A No.

Q If you've worked there one year versus 17 years you're at the same level as far as what days or what hours you may get?

A Yes.

[39]

Q Does anybody help you with that job?

A Right now I've delegated to supervisors to help with the server scheduling, but I still maintain the kitchen scheduling.

Q So you do the kitchen scheduling by yourself?

A I do. I mean, I ask Shannon Fultz to make sure that -- I'm making sure she's covered. But yes.

Q Is it accurate to describe that you do it but she reviews it to make sure there's no gaps?

A Yes, that's correct.

Q Are employees allowed to request a particular day off?

A They are, and I try and work with them, yes.

Q I assume – and let me back up. A full-time employee doesn't always work the

same schedule from week to week; is that correct?

A That's correct.

Q They may have Wednesday off one week and work Wednesday the next week; is that accurate?

A Yes. In university catering, that is correct.

Q In 2005, there was an issue related to Connie McVicker. Do you recall that?

A I do.

Q Maetta Vance complained that she was being harassed and discriminated against. Do you

[40]

recall that?

A She made a complaint concerning some terminology that Connie McVicker had used, yes.

Q What was that terminology?

A "Nigger."

Q That's a complaint, right, about being discriminated against?

A Yes.

Q Is there any way that word could be interpreted as not discriminatory?

A No.

Q Did Maetta's schedule change after she made that complaint?

A Maetta was still part-time. Not to my knowledge, no, not that I recall.

Q Explain to me how breaks work for employees.

A Because we are a flexible unit, our business changes every day, our scheduling changes every day. So breaks are based on when they can get a break, you know. If they are needed -- they need to let a supervisor know they're taking a break.

Q Are employees entitled to breaks during each shift?

A They are.

[41]

Q What are they entitled to?

A If they're working an eight-hour shift, they're entitled to two 15 breaks and a 30-minute.

Q · Lunch break?

A Yes.

Q During busy times do employees ever skip those breaks?

A Employees have, yes.

Q Are they then paid for that time if they work through a break --

A Yes.

Q – or work through a lunch?

A Yes.

Q How does that work?

A They need to notify a supervisor that they skipped the break.

Q Who are they to notify when that happens?

A A supervisor whether it be -- preferably it's somebody in the kitchen, they're asked to notify the chef. If it's somebody in the front of the house, they're asked to notify a supervisor up front.

Q So for Maetta's position she should notify the chef?

A She should.

[42]

Q What about Lisa Fordyce?

A She can, she can notify Lisa Fordyce.

Q That would be okay with you?

A Yes.

Q What about you directly?

A Me directly would be fine too.

Q Have there ever been issues with employees when they've said, "I worked through this break or this lunch and payroll didn't catch it. I deserve an hour more or half hour more," whatever?

A There have been.

Q How were those addressed?

A Unfortunately, that's happened where then their check is shorted. So then we need to -- there's a term for the form now that I don't recall, but at the time I believe it was called a green sheet only because it was green, and you would fill that out, specifying the reasoning why the employee wasn't paid, and turn that in.

Q **Who would fill that out?**

A Normally Lisa Fordyce.

Q **What records are kept to determine whether an employee received the right amount of money, in other words, whether they worked through a**

[43]

break, whether they worked through a lunch, how does an employee check that?

A If they're clocking in and out accurately, it will show up on the Chronos machine. Chronos is our time-keeping or our schedule-keeping.

Q **Do you clock in and out for breaks?**

A An employee?

Q **Yes.**

A For 15s, no. For 30-minutes they are, yes. They're supposed to.

Q **So for the 15, that's where the problem is. They don't clock out anyways and does Payroll automatically deduct that?**

A For a 15?

Q **Yes.**

A No, they are paid for a 15.

Q So when an employee works through that break, what are they going to collect? They've been paid anyways; right?

A I don't understand the question.

Q Well, if you take your 15-minute break, you're still paid for that; correct?

A Yes.

Q When you work through that, you said there's been sometimes when employees have been shorted

[44]

because they worked through a break. Are they paid additional money for working through the break?

A No. I was referring to their 30-minute.

Q So if you worked through your 15-minute break, there's no additional pay; you just lost your break?

A I guess, yes.

Q The only issue comes when you work through your 30-minute break?

A I believe so, yes.

Q If they've not clocked out, then why do they have to go to payroll and say, "You missed that"? Wouldn't payroll catch that automatically?

A (No response.)

MR. SHOCKLEY: Object to the form, it's vague.

MR. KRESS: I agree.

Q I'm trying to follow up with: You said there have been times when people have been shorted because they worked through a break and were not paid. Would they have clocked out and then worked through the break?

A No.

[45]

Q If they didn't clock out, why were they shorted in the first place?

A Because as I understand payroll, and I don't claim to be a payroll expert, after a certain period of time, because there are some employees who just won't clock out, a 30-minute is deducted.

Q **Automatically even though it's not on their timecard?**

A As I understand it, yes.

Q **And you say you're not in the payroll area. Who do you work with in the payroll area when these issues arise?**

A Lisa Fordyce handles the payroll for university catering.

I need a Kleenex.

Q **That's fine. One of the ground rules I forget was if you ever need to take a break, just tell me.**

A That's fine, okay.

Q **Has Maetta Vance made complaints to you about being discriminated against?**

MR. SHOCKLEY: Objection, asked and answered.

Q **You can answer.**

[46]

A In regards to Connie McVicker.

Q **Has she ever made complaints to you about being harassed?**

A I'd have to say without looking at the file, the paperwork, I don't recall.

Q Has the only complaint that Maetta Vance has made to you ever has been the treatment of Connie McVicker?

A No.

Q She complained to you about Saundra Davis; correct?

A She did.

Q Have you ever informed Maetta Vance when she made these complaints that there's nothing you can do about it?

A No.

Q Have you ever informed her that you're at a loss as to what she wants you to do?

A That sounds familiar.

Q I'm trying to delve into that further, then, I guess. Tell me when you've told her that there's nothing – or that you're at a loss and you're not sure what you can do for her.

A Its been in the presence of Gloria Courtright where we would ask Maetta, "How would you like

[47]

us to fix this? What do you want to happen? What do you want to see happen?"

And her comment was, "I want it to stop."

Q **Okay. When was this?**

A Its been in the span of time from the Connie McVicker complaint, which I believe was in 2005.

Q **Has it happened more than – has that type of conversation happened more than once?**

A Not to my knowledge.

Q **So somewhere between 2005 and today, there was a conversation where you asked, "What do you want us to do about it?"**

And she said, "I want it to stop." That's what you testified to, that's what happened; right?

A Yes.

Q **Can you pinpoint, was that closer to 2005, did it happen last month? I'm trying to pin down when this conversation happened.**

A I would say it was closer to 2005.

Q How did you respond when she said, "I want it to stop"?

A I don't recall.

Q How did Gloria Courtright respond?

A I don't recall.

[48]

(Deposition Exhibit No. 3 marked for identification.)

MR. SHOCKLEY: Off the record.

(A discussion was held off the record.)

Q Here's Exhibit 3. This is an email string from June 2001. You're both a sender and a recipient on this string along with Ann Talley and Karen Adkins; is that accurate?

A I'm sorry, I was reading this and I wasn't paying attention to your question.

Q That's all right. This document marked BSU1192 and 1193, it's an email string in June 2001.

A Okay.

Q **It's a series of emails, and you've sent some and received some, and the other people involved are Ann Talley, Karen Adkins, Sali Falling, and there's some other individuals listed. Do you see that?**

A I do.

Q **If you go down to the bottom of page 1 it says, "Bill Kimes 6/18/01, 8:47 a.m." It looks like this is an email you sent. Am I reading this correctly?**

A Yes.

Q **It says, "I am a little confused and I am at a**

[49]

loss what to do. Ann Tally told me to come to you when I'm being treated differently." That's what Maetta told you; do you see that?

A Yes.

Q **Do you remember what this was related to?**

A Can I have a moment to read it?

Q **Sure, absolutely.**

A Well, based on the conversation it's referring to a scheduling issue.

Q Down on the second page of the exhibit.

A Okay.

Q This is – you're saying, "I'm feeling like she's wanted preferential treatment or that she wants her cake and eat it too." Do you see that?

A Yes.

Q Then it says, "I'm at a loss."

A Yes.

Q Why did you think Maetta wanted preferential treatment?

A Because at the time her schedule availability wasn't past 2:30 but she was still wanting 40 hours. But there are times that I didn't have any work. She couldn't pick up the hours in the late nights, and that's when I had the work

[50]

because our events would happen after 2:30.

Q Then you say, you go to the top and it's towards the end of the first paragraph. I'll kind of help you, it's small type. "I do

know that employees should not feel comfortable or afraid in the workplace." Do you see that?

A "That they should not feel uncomfortable or afraid in the workplace," yes.

Q It's common sense, you don't want an employee to be afraid in the workplace?

A Yes.

Q If they are, you try to do something about it?

A Yes.

Q In 2005, you were informed that it would be a good idea to move McVicker away from Maetta Vance; correct?

A That sounds familiar.

Q Was Vance's position changed in 2005 so that she wouldn't be around McVicker?

A I'm sorry, did you say Vance's job changed?

Q Yes.

A No. I mean, we tried to schedule alternating weekends because Connie McVicker was a truck driver. so I needed her to work on the weekends.

Q So you tried to alternate the weekends?

[51]

A Yes.

Q When McVicker worked, Vance didn't, and vice versa?

A We tried. Sometimes it didn't work out, but we tried.

Q But Vance's position didn't change?

A Or her job, no.

Q Or her work area?

A No.

Q And McVicker's job position didn't change in 2005?

A She was still our truck driver, yes.

Q She still worked in the same physical areas?

A There were times, but we tried to keep the distance in the sense --

Q But –

A Go ahead.

Q **I didn't mean to interrupt, I thought you were finished. Go ahead.**

A I've lost my train of thought.

Q **She wasn't moved into another area in 2005?**

A When you say "another area," I don't know what you mean.

Q **She was moved to another area in 2007; correct?**

A She bid on a different job.

[52]

Q **In 2007?**

A Yes.

Q **But you didn't require that she be moved in 2005?**

A I couldn't force her to move. I didn't have that authority.

Q **You don't have any authority to say, "I can't have this truck driver working for me"?**

A She's a bargaining unit employee. I can't force her to take a job.

Q **Do you have the authority to fire Connie McVicker?**

A Not without justification, no.

Q **Do you have the authority to fire Connie McVicker?**

A Not without justification, no.

Q **Is calling another employee a nigger justification?**

MR. SHOCKLEY: Object to the form. That's out of context. There's no evidence of that comment being made by McVicker to Vance.

Q **You can answer.**

MR. SHOCKLEY: Yes, you can answer.

A I don't know.

Q **Is threatening another employee justification?**

[53]

A Based on the rules in the handbook, I believe it is. I don't know which rule that is off the top of my head, but it is.

Q **Do you have that authority? Do you make that decision or does somebody else?**

A The way the chain goes, we would fill out documentation and submit that to direct report in employee relations who then would advise on appropriate discipline.

Q **Have you ever fired anybody?**

A I have.

Q **How did that work?**

A I would fill out the appropriate documentation, submit it to my direct reports in employee relations. They would help advise on the appropriate action, and then --

Q **Who are your direct reports? Who are you submitting this to?**

A Karen Adkins.

Q **Name an employee that you fired.**

A Phyllis Hullinger.

Q **How long ago?**

A Six years ago, maybe.

Q **What was she fired for?**

A I believe attendance.

[54]

Q And you said, "I want to fire her," sent it to Karen Adkins, "Is this okay?"

A I don't know that I ever said I wanted to fire her. But I would fill out the appropriate documentation saying she was written up -- or she was verbally warned of her infraction, she was written up for the infraction, she was suspended for the infraction. The fourth is termination. So we followed the guidelines.

Q You made the decision to terminate her and you sent it to Karen Adkins; correct?

A I asked for advice, yes.

Q Could you have made a decision that, "I don't want Connie McVicker working here" and send it to Karen Adkins? " I want to fire her."

A Possibly.

Q But you didn't do that?

A I didn't do that, no.

Q Are you aware of an incident where Maetta Vance claimed that Saundra Davis hit her?

A I'm aware of that claim.

Q Tell me about it.

A I wasn't present. I can't tell you about it.

Q Did Maetta Vance complain about that incident to you?

[55]

A No, she did not.

Q How did you become aware of it?

A Through her claims on the -- I don't know what the reports are called. I'm at a loss for the terminology.

Q So she made a complaint and some report got sent to you?

A I believe she made a complaint to university compliance a couple of years ago.

Q Okay. I'm going back to the incident when she was hit in 2001.

A I'm not aware of an incident in 2001 that she was hit.

Q Okay. Do you recall an incident in 2005 where Maetta Vance claimed that Saundra Davis blocked her from getting off

the elevator and there was a confrontation?

A I do.

Q How did you find out about that?

A Maetta came to me.

Q She complained to you?

A Actually I believe Saundra was the first one to make the complaint, and then I didn't -- I can't answer that question fully without looking at the documentation, I'm sorry.

[56]

Q Do you remember Maetta complaining about the incident?

A I remember having a discussion with Maetta about it, yes.

(Deposition Exhibit No. 4 marked for identification.)

Q I hand you what's been marked as Exhibit 4.

A Okay.

Q **This is an email dated September 28, 2005. Is this an email about the elevator incident?**

A I believe it is, yes.

Q **And Ann Talley's email to you which you're copied on. Do you see that?**

A Yes.

Q **It said, "Vance complained that Davis gave her a look and made a statement that made her afraid." Do you see that?**

A I do.

Q **Then it goes down and says, "We have considered moving Vance out of catering for some time due to issues that surround her." Are you part of this "we" that has considered moving Maetta out of catering for some time?**

A No.

Q **Do you know who that "we" is that she's**

[57]

referring to?

A I do not.

Q The email below that says, "Attached you'll find the IDF for the incident."

A Yeah.

Q What's an IDF?

A Internal documentation form.

Q You prepared that?

A I did.

Q What do you do to prepare an IDF?

A An IDF is basically, again, a form that you put all of your documentation, and how to prep, you make sure you have the facts of what happened and then you talk to the witnesses that if there's an incident between one or two persons, three persons, you find out who witnessed -- you interview the witnesses, fill out what is said, and then send it on to direct report and employee relations.

Q Who did you interview in relation to this interview?

A Based on this email, again, without looking at the IDT. I would have to say Saundra, Maetta and Betty Skinner.

MR. KRESS: Let's take a five-minute break.

[58]

(A recess was taken.)

BY MR. KRESS:

Q **Did Maetta Vance ever tell you that she felt intimidated and threatened by Saundra Davis?**

A She may have. I don't recall.

Q **You're not sure?**

A I'm not sure, no.

Q **Were you involved in the investigation of the Connie McVicker incident?**

A In 2005?

Q **Yes.**

A Yes, I was.

Q **What was your involvement?**

A I helped interview.

Q **Who did you interview?**

A I know I spoke to Maetta, I know I spoke to Connie. I believe I spoke to Julia Murphy, I believe I spoke to Jim Hiday, I believe I spoke

to -- I believe I spoke to Brad Hudson and, without looking actually at the IDF, I don't know. I can't recall everyone else.

Q What is your recollection of what Maetta said about the incident?

A I believe she came -- I believe she made a complaint about she had been talking with a

[59]

fellow employee and they had told her that Connie was using the term "nigger," and then also something about the Klan. But, again, without actually -- I can't recall exactly everything, but I think those were the two specifics.

Q Okay. Did other witnesses corroborate that Connie McVicker had used the N word directed at Maetta and had talked about her relatives in the Klan?

A If I'm not mistaken, I believe one corroborated that the word was used. I can't say that it was used in relation to Maetta.

Q Were you aware -- did Maetta Vance make any complaints to you that Connie McVicker called her a monkey?

A I am.

Q When did she make that complaint?

A I believe it was after the initial complaint in 2005, but time frame, I'm sorry.

Q You don't know the exact time. It wasn't part of that same complaint about the N word and the Klan, she complained again and said, "She called me a monkey" at some other time period?

A Yes.

[60]

Q Did you interview anybody regarding that?

A I did.

Q Do you recall?

A I interviewed Maetta, I interviewed Connie, I interviewed I believe Betty Skinner, and I don't know if I interviewed -- if there was another person part of that.

Q What did Connie McVicker say about that complaint?

A I was coughing when you asked the question, I'm sorry.

Q **What did Connie McVicker say about that. You interviewed her?**

A She denied.

Q **Did you interview Patsy Amos?**

A As part of the -- no, I don't believe she was named as a witness.

Q **She worked at UBC in 2006; correct?**

A She did.

(Deposition Exhibit No. 5 marked for identification.)

Q **I hand you what's been marked as Deposition Exhibit 5. If you turn to the back page, second page, you'll see that there's a signature of Patsy Amos dated 5/29/07.**

[61]

A Okay.

Q **You're free to read the entire thing if you want. I'm going to ask you some questions, but I don't want you to –**

If you'll see paragraph 7, it says, "In working with Connie McVicker, I heard Ms. McVicker refer to Maetta Vance as a, quote, porch monkey." Do you see that?

A I do.

Q And you never talked to Patsy Amos about anything that she'd heard?

A Again, no, because I don't recall her being named as a witness at the time the complaint was made.

Q You see paragraph No. 8, it says – after Patsy was transferred to work in the kitchen, that she had a meeting with you and, according to Patsy that you stated, "I see you have some new friends."

A Okay.

Q Did you make that statement?

A I'm not sure if I did or not.

Q Do you see in paragraph 10 she said she noticed that the treatment of yourself was hostile towards Maetta Vance?

[62]

A I see that comment, yes.

Q Do you know why she would say that?

A I do not.

Q Have you ever been hostile towards Maetta?

A Not to my knowledge, no.

Q Have you ever threatened her?

A No.

Q Have you ever ignored her complaints?

A No.

Q Paragraph 12 talks – she was told by Tim of the union. Do you know who that is?

A Without his last name I can only assume, but yeah, I think so.

Q Who do you think that is?

A I believe it's Tim Jenyk.

Q You had said that two complaints in 2005 related to McVicker where, you said, the N word and something about her family in the Klan.

A Yes.

Q Did any of the witnesses or did Maetta ever inform you that Connie McVicker said that Maetta had better watch herself be-

cause Connie had members of her family in the Klan?

A Repeat that because I was focusing on, it was one complaint, not two complaints.

[63]

Q It was one complaint, and there were two different facets to it; is that accurate?

A Yes.

Q It was the N word and there were people in her family in the Klan?

A Yes.

Q Did anybody talk about McVicker informing them that she had family members in the Klan and that Maetta better be careful because of that?

A I don't recall that that was said. I'm not saying it wasn't; I don't recall.

Q Do you know what the Ku Klux Klan is?

A I do.

Q What is it?

A It's a hate group.

Q **Okay. Who do they direct their hate towards?**

A Typically African-Americans, homosexuals, others.

Q **Did you end up disciplining Connie McVicker as a result of these statements?**

A I did.

Q **What was the discipline?**

A I believe it was a written warning.

(Deposition Exhibit No. 6 marked for identification.)

[64]

Q **I hand you what's been marked as Exhibit 6. Is this the written warning you're referring to?**

A Yes.

Q **This is your signature?**

A It is.

Q **You had said earlier – and you did qualify it, I'm not trying to trick you that you said you remembered one witness using this. This written document says, "Sev-**

eral witnesses attested to her use of the N word, verbal reference to the Ku Klux Klan and glaring, looking Intently or staring for long periods at coworkers."

A Okay.

Q Does that refresh your recollection as to the outcome of your investigation?

A I also have to state that I did not type -- did not type this. I signed it. But, again, I recalled one person. It's not saying that more didn't say that. I just can only recall one person saying that. Again, without looking at any interviewing notes, I can't answer that.

Q Did you sign this attesting that this is what happened, or someone else typed this and this is what the university wants to do?

A Somebody else typed that. I signed it after

[65]

reading it and at the time I agreed with it, yes.

Q It says, "or staring for prolonged periods at coworkers." Is that Maetta Vance?

A I can only assume.

Q Is there any other coworker that you know of?

A Not to my knowledge, no.

Q Do you know why Maetta Vance's name wasn't used and instead the generic "coworkers" was used?

A I do not

Q Who typed this?

A I don't know. I can't answer that because I'm not aware of who typed it.

Q How did it come to you?

A I actually went over to our central office where the administration for dining has their offices, and I signed it.

Q Who did you pick it up from?

A Karen Adkins.

Q So she gave it to you?

A I'm going to -- yeah, I believe it was Karen,

Q It says, "Violation of Rule No. 27."

A Yes.

Q "Any other conduct which is inconsistent with proper behavior."

[66]

A Okay.

Q Are you familiar generally, maybe not what number each one is, but familiar with the rules? This is No. 27, so there's obviously 26 before that.

A Yes.

Q Where are these rules written?

A I'm sorry, I didn't mean to interrupt.

Q That's all right.

A And as a cause of my interrupting, I --

Q Where are these rules written?

A They're actually in the employee handbook.

Q Is there anything in the employee handbook that deals with racial discrimination?

A In the handbook or in the rules?

Q In the rules.

A Off the top of my head I don't recall. I don't know.

Q **Were you involved in this decision to discipline McVicker, for picking Rule 27 as the reason for warning, or was that done by Karen Adkins and people other than you?**

A I don't believe it was done strictly by Karen Adkins, no.

Q **Were you involved in that decision?**

[67]

A I would say by my signature, yes, I was.

Q **The reason I'm asking is you had said this was prepared. I'm trying to find out how much involvement you had in picking the reason for the written warning, or whether it was just done and then you said, "Yeah, this sounds right." Which –**

A I would agree with the latter comment.

Q **It was prepared by others, they picked the reason. When you looked at it, you agreed with it. You weren't at any meetings to decide what rules did she break?**

A No.

Q **You didn't talk to Karen Adkins and say what formal rule she broke?**

A No.

Q I mean, we don't need a rule to know it's wrong to use the N word to another employee, do we?

A No.

Q We don't need a rule to say it's wrong to threaten another employee, do we?

A No.

Q Do you think there's a rule regarding physical threats to employees as part of the rules?

A I believe there is.

[68]

Q And that rule wasn't cited?

A I don't believe it was, no.

(Deposition Exhibit No. 7 marked for identification.)

Q Handing you what's been marked as Exhibit 7. This is an email string in October 2005, one dated October 17th and one dated October 18th, it's document BSU1248. Who is Sherri Harris?

A I want to say she works in university compliance.

Q Who is Katie Skinner?

A I believe she also works in university compliance.

Q The email from Katie Skinner dated October 17th – have you ever seen this –

A I have not.

Q – this email string before?

A I have not.

Q The second paragraph, last sentence, "Maetta said she's afraid for her safety and doesn't think anything has been done about the situation." Did you know that Maetta felt afraid?

A I don't recall.

Q Did you know that Maetta felt like nothing had

[69]

been done about the situation?

A I don't recall.

Q Have you ever been threatened with physical harm at work?

A At work?

Q Yes.

A At Ball State?

Q Yes.

A No.

Q Have you ever been called "less than human"?

A Yes, I have.

Q How did it feel?

A Not the greatest, no.

Q If someone did that to you continually, would you expect your employer to take action?

MR. SHOCKLEY: Object.

Q You can answer.

MR. SHOCKLEY: There's no basis for that in the evidence.

Q You can answer.

A Rephrase the question, please.

Q If someone called you "less than human" continually, a coworker, would you expect Ball State to do something about it?

MR. SHOCKLEY: Object to the form of the

[70]

question.

Q You can answer.

A I would hope.

Q In May of 2007, Connie McVicker got moved to a different area; correct?

A The timing sounds about right, yes.

Q I may be off a little bit on the timing. It happened; correct?

A Yes.

Q Were you involved in that process?

A Not really.

Q Who – go ahead, I'm sorry.

A As I understand it. Connie bid on a job. She was accepted, she was moved.

Q **There's an email, and feel free to look if you want, I believe it's Exhibit 3 that talks about in 2005 recommending that Connie and Maetta be separated. I've got the wrong number, it's 4. I apologize, that's not right either.**

I believe I asked you earlier that you had been informed in 2005 to do your best to keep McVicker and Vance separated; is that right?

A Okay.

Q **In 2007, McVicker moved; correct?**

A To another unit.

[71]

Q **Do you have the authority to reassign an employee to a different unit?**

A No.

Q **Who does?**

A Specifically I wouldn't know.

Q **You have the authority to fire, at least to recommend for firing; correct? That's what you did with Phyllis Hullinger?**

A Yes.

Q **But you don't have the authority to take the lesser punishment of "I want them moved over here"?**

MR. SHOCKLEY: Object to the form of the question. That's really vague. "Moved over here."

Q **Moved to a different unit.**

You can answer.

A I can't move a -- I can't move an employee from one unit to another.

Q **Why not?**

A I don't have that authority.

Q **Okay. What's Connie McVicker doing today?**

A My belief, she's stock clerk custodian for Cardinal Crossing.

Q **And Cardinal Crossing is still in your**

[72]

oversight?

A It is. but it's still considered a different unit.

Q So you're still her supervisor?

A I am not. Well, let me rephrase that. Ultimately in the hierarchical, probably. But I'm not a direct supervisor, no.

Q You were in 2005?

A I was.

Q You're just going to have to explain to me, then, because I thought you oversaw both the banquet and catering side and Cardinal Crossing.

A I do.

Q If she's in Cardinal Crossing, why isn't she directly under your supervision?

A I believe I explained I oversaw it more from a financial than a day to day in the Cardinal Crossing.

Q Who oversees it on a daily basis?

A Tina Swift and Fran Percy.

Q Do you know if Ball State had the authority to say to McVicker, "You can't work in this area, we're moving you over to the Cardinal Crossing area"?

MR. SHOCKLEY: Object to the form.

[73]

Q **You can answer.**

A I don't know if they had that authority, no.

Q **Vance and McVicker still have to come into contact with each other from time to time; is that accurate?**

A I would have to say no, they don't have to come into contact, no.

Q **Is it likely that they're going to come into contact?**

A Are they going to potentially be in the same area? Yes. Alone? No.

Q **Does Vance, as part of her duties, does she have to go into the Cardinal Crossing area?**

A To collect her product, yes, at times.

Q **When she goes to collect her product, is she accompanied by anybody?**

A I can't answer that, I don't know.

Q **Is it a rule that she has to be accompanied by somebody?**

A No.

Q Then how are you sure that she can't be alone with McVicker? She goes alone to that area; right?

A Okay.

Q So she could be alone with McVicker?

[74]

A Possibly, I guess.

Q Describe to me the physical proximity, when you say Maetta has to go get her product, explain to me where she goes to get that.

A I'm smiling because it's -- it's sort of a screwed-up system in the sense that we have four floors we keep product on. It's not the most ideal situation.

Q Let me break that down. What floor does Maetta normally work on? When you say "four floors," what number would it be?

A Second.

Q Where is the product that she's going to pick up at Cardinal Crossing?

A Cardinal Crossing would be on first.

Q **Do you use a stairs or an elevator to get there?**

A Either one.

Q **When you're going to pick up product, would you more likely use the elevator, you're going to have a tray or be carrying something possibly?**

A Yes.

Q **When she goes to pick up her product on the first floor, try to describe for me the physical floor, where you do that on the first floor.**

A Well, if you take the elevator down to the first

[75]

floor, the elevator is -- it's located approximately in the middle of the kitchen, the Cardinal Crossing kitchen. And if I were to take maybe 15, 20 steps and veer right, I would be at a freezer that is assigned to university catering.

Q **Does Connie McVicker have a workstation or work area on that floor?**

A Well, she's the stock clerk custodian, so she pretty much has run of the entire -- she's cleaning, she's putting up stock. So yes, I would say there's an area.

Q Does she put up stock in this area where Maetta would go pick it up?

A More than likely, yes.

(Deposition Exhibit No. 8 marked for identification.)

Q I hand you what's been marked as Exhibit 8, document BSU1030. Have you seen this email before? I'm sorry, it's addressed to you, I was looking at the cc's. November 11, 2005. So do you recall this email?

A I do.

Q There's a note on the corner that says "Kimes file."

[76]

A Okay.

Q Do you know whose handwriting that is?

A From what I remember, possibly that's Ann's -- I'm sorry, Ann Talley's.

Q It says, "Bob Cope has prepared a written warning to be issued to McVicker for Rule 27." Who is Bob Cope?

A Bob Cope was Ann Talley's secretary, I believe now is Jon Lewis' secretary, assistant. I don't know what his official title is.

Q If it says he prepared it, would he have prepared it at Ann Talley's direction?

A Yes.

Q This email says that you were to advise McVicker that they were totally unacceptable behaviors --

A Yes.

Q – using of the N word and intimidating others by reference to the Klan association.

A Okay.

Q Did you do that?

A I did.

Q When did you do that?

A When I issued her verbal -- when I issued her written warning.

Q You handed her the written paper and then also

gave her verbal instruction?

A I did.

Q Do you recall what you told her?

A I do not.

Q You do recall that you advised her that the remarks were completely unacceptable?

A I do.

Q The last sentence, "Next time we will need dates, times and witnesses, so stay sharp." What does that mean?

A Can I read the paragraph first?

Q Sure, absolutely.

A Well, since I didn't write this, I can only guess, but I would assume she was referring to that if this were to occur again, she was giving me direction on how to fill out my IDF.

Q If you go back to Exhibit 6, that's the written discipline on there.

A Okay.

Q Supervisor's recommendations, the last sentence, "Future violations of university

rules and regulations will result in further disciplinary action."

A Okay.

Q It doesn't say "including termination," does it?

[78]

MR. SHOCKLEY: Objection. The document speaks for itself. It is what it is.

Q Does it say "including termination"?

A Not on this document, no.

Q Did you inform McVicker that the next discipline could be termination?

A I did not. I informed her what the disciplinary levels were.

Q Okay. What are the disciplinary levels?

A First is a verbal, second is a written, third is a suspension, fourth is termination.

Q If she used the N word towards Vance again, would she be suspended?

MR. SHOCKLEY: Objection. You're asking him to speculate on a set of facts that never happened.

Q It's a hypothetical, you can answer the question.

MR. SHOCKLEY: Well, he's not an expert witness, he's a fact witness. He's not an expert witness, doesn't answer hypotheticals.

MR. KRESS: He's someone that's familiar with the policies of Ball State and implements discipline.

MR. SHOCKLEY: You're asking him to guess.

[79]

MR. KRESS: I'm not asking him to guess.

MR. SHOCKLEY: I advise him not to guess. I think it's an inappropriate question. It's a hypothetical question to a fact witness. You're asking him to guess about what might happen about a decision that he's testified would not be his on facts that are uncertain and speculative, and it's an inappropriate question.

MR. KRESS: It's not. You can make your objection --

MR. SHOCKLEY: I'll advise him not to answer, and you can certify it if you wish.

MR. KRESS: Certify the question. There's no basis not to answer that question, and you know it.

MR SHOCKLEY: Go ahead.

Q You've been trained at Ball State regarding discrimination; correct?

A I have.

Q You know what the policies are?

A The policies of discipline?

Q Yes.

A I do.

Q What would happen if Connie McVicker used the N word towards Maetta Vance again? What would

[80]

happen in Ball State's policy of discipline?

MR. KRESS: Which he just stated he's familiar with.

MR. SHOCKLEY: It's one thing to ask him what he would recommend, that's within his knowledge. Its quite another to ask him

more broadly what the university would do which involves the decision process of a lot of people above and other than himself. I'm not objecting to you asking him what he would do or what his reaction would be or what his recommendation would be, I have no problem with that. I think that's appropriate. To ask him what Ball State would do, he's not the witness to answer that, and I'll object to that for the same reason I objected to the previous one. I'm not sure what your question is at this point.

Q According to the policies of Ball State, what would be the next level of discipline if Connie McVicker used the N word towards Maetta Vance again?

MR. SHOCKLEY: Well, I'm going to object to that for the same reason, David.

MR. KRESS: He just said he knows the policies of Ball State.

[81]

MR. SHOCKLEY: The policies of Ball State provide for a first offense, a verbal warning. You want him to step out, that's fine. That didn't happen in this case, they escalated it over that and went to the second step. So how can you now say it will be in the future if

something else we don't know that's happened yet, if it happens, it will be this?

MR. KRESS: I want his testimony and not yours.

MR. SHOCKLEY: It's an inappropriate question. You're still asking him to guess.

MR KRESS: I am not. He answered a question that this document is written this way according to the policies of Ball State University. This is their policy that we don't write --

MR. SHOCKLEY: That is what they're doing in response to a specific set of facts. This is a decision made with regard to something that happened, not what might happen in the future that nobody knows yet.

MR. KRESS: Ball State did not write "up to and including termination" because it wasn't according to the policies, according to his

[82]

testimony, and I'm going to continue to explore that.

MR. SHOCKLEY: That isn't what he said.

MR. KRESS: That is what he said.

MR. SHOCKLEY: That isn't what he said.

MR. KRESS: That is what he said.

MR. SHOCKLEY: Well, the record is what it is. We don't need to argue about that.

Go ahead. I don't know if there's a question pending.

Read it back and see if I have an objection to it.

(The previous question was read back by the reporter as follows: "According to the policies of Ball State, what would be the next level of discipline if Connie McVicker used the N word towards Maetta Vance again?")

MR. SHOCKLEY: All right, go ahead and answer it, let's move on.

A I can't answer that because it didn't happen.

Q Okay. You don't know what the policy is?

MR. SHOCKLEY: That's not what he answered. You're arguing with him.

MR. KRESS: I'm not.

MR. SHOCKLEY: Yeah, you are.

[83]

MR. KRESS: I'm testing his answer which is what you do in a deposition.

MR. SHOCKLEY: That wasn't what he said.

A The written policies as they state, first offense is verbal, second offense is written, third is suspension, fourth is up to and including termination, but, based on the severity of a situation, you can jump a step, two steps, potentially three steps. But the discipline was issued. I can't answer the second question because it didn't happen, so I don't know.

Q Who has the authority to jump steps of discipline; do you?

A No.

Q Who does?

A Not on my own, no.

Q Who would you need approval from?

A I would probably go to our assistant director of personnel and then also employee relations.

Q The first assistant director is Karen Adkins?

A Karen Adkins, and the second is Melissa Rubrecht.

(Deposition Exhibit No. 9 marked for identification.)

[84]

Q I hand you what's been marked as Exhibit 9. This is a document marked BSU0068, and I just saw, I didn't realize when it got copied, that this is page 2 of 2, so there may be a first page.

MR. KRESS: Can we go off the record for a minute?

(A discussion was held off the record.)

Q I've now handed you the first page of that.

A Okay.

Q Do you recognize this document?

A It looks familiar, yes.

Q What is it?

A Its an IDF or an internal documentation form.

Q Who prepared that?

A It looks like Dave Ring who is a sales and service -- I'm sorry, who was a sales and service supervisor for us.

Q When was that prepared?

A It looks like it was prepared January the 3rd, 2005.

Q If you'll notice at the bottom it says, "Revised 3/8/04." Is that talking about the form, the IDF form?

A I believe so, yes.

[85]

Q Obviously he's not talking about this document –

A No.

Q – because it occurred after this date.

Okay, now we're going back to 0068. I wanted you to see the whole thing, I didn't realize that happened in copying.

A Okay.

Q If you'd actually just take a minute to read that.

A Okay, I'm done.

Q Does that accurately summarize your meeting with Maetta?

A It sounds -- I mean, vaguely I remember it, yes.

Q Did she inform you that she was still uncomfortable in the workplace?

A According to this, according to this, yes.

Q Did she inform you that she was still receiving threats, looks, whistling noises and laughing?

A According to this, yes.

Q It says that you explained to Maetta that you could not control her feelings. Did you tell her that?

A According to this, yes.

Q Do you think this is inaccurate?

[86]

A No, but as I mentioned early, this vaguely looks familiar.

Q I'm just trying to go through and see if there's anything that you disagree with.

A I understand.

Q So far you agree with everything that's been said?

A I do.

Q It says that you gave her a Christmas present, and she left noticeably upset.

A It does.

Q And then you asked her what was wrong. Does that sound right?

A It does.

(Deposition Exhibit No. 10 marked for identification.)

Q I hand you what's been marked as Exhibit 10. This is a series of notes.

A Okay.

Q Do you recognize these?

A It looks like it -- yes, I do. It looks like it's part of an internal document form.

Q Okay. And you interviewed Amy Geesaman on September 26th, 2005?

A According to this, yes.

Q And Amy Geesaman said that she heard Connie use the N word towards Maetta?

A Actually I believe my question is, "Have you ever heard Connie McVicker use in the presence of employees in the student center the term 'nigger'"?

Q Okay.

A I don't believe that says "towards Maetta."

Q Then if you go down to the last paragraph, "called her"?

A I'm sorry, say that again.

Q "Maetta asked me if it was true that Connie had called her a 'nigger'"?

A Oh, okay. Okay.

Q This transcript – I don't know if it's a transcript. This recording of this meeting with Amy Geesaman, yourself and Lisa Fordyce, it says was present, although it doesn't look like she asked any questions; is that accurate?

A It is.

Q Was this verbatim what was said, or how do these get typed up?

A Typically it's sort of the same kind of thing with us today. You're not typing or -- I guess you're writing notes, I don't know, I've not

[88]

been paying attention. But you've got somebody as a witness taking notes. That's sort of what Lisa Fordyce is doing.

Q So you're asking the questions and Lisa is recording this?

A Yes.

Q is she doing it handwritten or does she have a tape recorder, is she typing?

A It's handwritten.

Q So this interview, based on this, looks like it took a minute?

A Not long.

Q This is the full substance of the interview, this isn't a summary?

A No. It is pretty much, yes.

Q And the next one – that was on Monday, September 26th. Then the next one goes to September 28th, a meeting with Julia Murphy.

A Okay.

Q This is an accurate transcription or typing of –

A It is.

Q – what the interview was? Again, not very long, took five minutes or so?

A Yes.

[89]

Q And then later on September 28th you interviewed Brad Hudson?

A Yes.

Q He said that he'd heard Connie use the N word referring to the person in the bakery?

A Yes.

Q Did you understand that to be Maetta Vance?

A I did.

Q Could it have been anybody else?

A I wouldn't have taken it as that, no.

Q **Are there any other African-American bakers in September 2005?**

A No, not that I know of.

Q **Then you also interviewed Maria Julius. Is this an accurate summary of what her testimony was?**

A It is.

Q **Again, a short interview?**

A Yes.

Q **And you interviewed Connie?**

A Yes.

Q **She denied making these statements?**

A According -- yes.

Q **Then you interviewed Maetta on October 20th?**

A Yes.

Q **Is this an accurate recording of that interview?**

[90]

A Yes.

Q Then it goes to Jim Hiday?

A Jim Hiday, yes.

Q On the last page he says that he's heard Connie use the N word in reference to African-Americans on the street?

A That's what he says.

Q So you had said you'd had to look back at some notes. These aren't all of them, I'm not trying to say that they are, but this is a series of them.

A Okay.

Q Do you now recall that more than one witness corroborated that Connie used the N word towards Maetta?

A I do.

MR. KRESS: Let's take a break.

(A recess was taken.)

BY MR. KRESS:

Q Mr. Kimes, if you want to turn to the first page of Exhibit 9.

A Okay.

Q **It said that the occurrence date – it says 12/22/05. Then the date above says January 3rd, 2005.**

[91]

A Okay.

Q **Can you explain to me – is the occurrence dated the date that the events described actually happened?**

A Yes.

Q **And is January 3rd the date that this form actually got completed?**

A It's January 3rd, it should have been 2006.

Q **Okay, right. The difference – it should be 2006 is one thing.**

A Yes.

Q **And then the other difference is the occurrence occurred 12/22, and then this report was made ten days later or thereabouts, whatever January 3rd is?**

A Yes.

Q **You don't prepare these forms on the date of the occurrence, you're always looking back at what happened?**

A I typically -- no, we don't.

Q **The forms are prepared – somebody makes a complaint or there's an occurrence, and then it takes a little time to do the interview and then you prepare the form; is that accurate?**

A Yes.

[92]

Q **Maetta Vance has been working in the salad area recently; is that accurate?**

A No.

Q **Where has she been working?**

A She's been doing production.

Q **Are salad and bakery both production?**

A Can be, yes.

Q **There was a period of time that Maetta Vance did a lot of baking; is that accurate?**

A That is.

Q **Is she doing baking now?**

A Has it been on her prep list? Yes.

Q **I'm not sure what that means. Has she been doing it? This is my ignorance, I'm**

not trying to trick you. I still don't quite get the prep list and how you take that and what happens.

A I can't answer that because I don't know, I'm not in the kitchen on a regular basis.

Q Chef would be the best person to answer that?

A Probably, yes.

Q As far as management goes at Ball State?

A Yes.

Q Is Saundra Davis a supervisor?

A Saundra Davis is a catering specialist.

Q Is that the same title as Maetta Vance?

[93]

A No, it is not.

Q Maetta Vance is – remind me. I know you told me. I didn't write down her title.

A Maetta Vance is a full-time catering assistant.

Q There's a difference between a catering assistant and a catering specialist.

A Catering specialist has a little bit more duty.

Q Is Saundra Davis considered part of management?

A I never -- no, not really. I mean, that's complicated. I mean, her duties are somewhat limited in the sense that I can't have her directing certain people. I mean, I can't have her directing Maetta.

Q Okay. Why not?

A Because part of what we tried to do was, when Maetta made a complaint concerning Saundra Davis, we tried to sort of separate.

Q Does Saundra supervise other employees?

A Does she direct and lead? At times.

Q What's the difference between directing, leading and supervising?

A Supervising is, you have an authority to discipline, I would say, an authority to - well, an authority to discipline, an authority to basically -- I don't want to use the term

[94]

"order around," but you sort of direct, you kind of direct the day-to-day operations or direct the events going out. You're supposed to be a leader.

Q Is Saundra an hourly employee?

A She is, and please forgive my hesitancy. I always confuse the exemption and the nonexempt.

Q Does she clock in?

A No.

Q So is she at a level above Maetta Vance?

A More than likely, yes.

Q And Brad Hudson?

A Yes.

Q Was chef Rice fired from UBC?

A He was.

Q For what?

A I don't know the whole reasonings.

Q Were you involved in that?
A I was.

Q Did you recommend his termination?

A At the time I recommended him being suspended pending further investigation.

Q And was he suspended or did they go straight to termination?

A At the time I want to say he was suspended

[95]

because I believe it was around Christmas, I think it was suspension, and termination came after the year -- after the start of the next year.

Q Was he suspended, or you gathered more facts and he came back and he was terminated?

A I don't believe he ever came back to work, no.

Q When was this, best you can tell? Was it two years ago --

A No.

Q – four years ago?

A It was many years ago.

Q You just remember it's around Christmastime?

A I remember it was Christmastime. I remember it was at least five, maybe six.

Q And you don't recall or don't know the basis of his termination?

A Not all of it, no.

Q What part of it do you know?

A Inappropriate conduct.

Q Which was what?

A As I recall, utilizing -- being unprofessional in the sense of he was considered leader, and he used inappropriate terms towards disabled and homosexuals including myself.

[96]

Q Derogatory language?

A Uh-hum.

MR. KRESS: I don't have any further questions.

MR. SHOCKLEY: I have just a few.

CROSS-EXAMINATION,
QUESTIONS BY MR. SCOTT E. SHOCKLEY:

Q Mr. Kimes, would you locate Plaintiff's Exhibit 3, please. Have you found that?

A I'm sorry, no.

Q It's a series of emails with "Sali K. Falling" up in the left-hand corner, if that helps you find it.

A Oh, I'm sorry.

Q You found it now?

A Yes.

Q Mr. Kress asked you about a statement that is contained in the top chart of this chain of emails, and you authored that top third or so of the first page; right?

A I didn't hear that comment.

Q You authored –

A Yes, I did.

Q – the email that is on the first third or so of

[97]

that page?

A I did.

Q And he specifically asked you about a sentence in the last paragraph of your

portion that says, "I do know that employees should not feel uncomfortable or afraid in the workplace." Do you remember him asking you a question about that?

A I do.

Q That statement that you made in that email in June of 2001, was that in reference to some complaints that you had received in the few days prior to that?

A It is.

Q Can you just tell us who made those complaints and what those complaints pertained to or what person they pertained to?

A Well, according to what I wrote, Phyllis Hullinger was speaking to chef Lou Rice in regards about concerns that she had concerning a fellow employee, Rikee.

Q Let me ask you this. You said up above that, "Two employees have come forward stating that threatening comments were made by Maetta Vance toward another employee." Do you see that?

[98]

A I do.

Q **What does that statement pertain to? Who are the employees, what were the threatening comments?**

A Can I just read?

Q **Sure.**

A "Also, Phyllis Hullinger spoke to chef Lou on June 17th, 2001, about concerns that she had 'that she would not be surprised if Maetta ran Rikee down in the parking lot and killed her.' Betty Skinner spoke today about her concerns over Maetta 'going postal.' The above employees are afraid to critique Maetta's work due to her retaliation."

Q **So you spoke to Betty Skinner about her concerns about Maetta, quote, going postal?**

A Betty came to me and said she had some concerns, yes.

Q **Is that a direct quote from Betty, "going postal"?**

A I believe it was, yes.

Q **Did she say anything further or in addition to that that clarified or detailed what she meant by that or what her concerns were about Maetta?**

A I don't recall, no.

[99]

Q In any event, your comment about employees should not feel uncomfortable or afraid in the workplace, who are the employees that that comment was made with reference to back in June of 2001?

A I believe it was the employees who were afraid to critique Maetta's work: Rikee, Phyllis, potentially Betty.

Q Mr. Kress asked you about the ability to physically separate during their working hours Connie McVicker and Ms. Vance after Ms. Vance's complaint about McVicker in the fall of 2005. Do you remember those questions?

A Vaguely.

Q Now, at that time Ms. Vance was a catering assistant; is that right?

A She was a part-time catering assistant.

Q Part-time catering assistant. And what was Connie McVicker's job?

A She was a full-time truck driver/custodian.

Q **So in the ordinary working hours or working day, would those two jobs require those women to work in close proximity to one another on a continuing basis?**

A Not on a continuing basis, no.

[100]

Q **Would they have contact each other intermittently throughout the working day, however?**

A Potentially.

Q **Can you describe for us – and this may be difficult, do the best you can – physically what kind of surroundings, for example, Maetta worked in during that period of time as the part-time catering assistant?**

A The physical walls, tables?

Q **Well, it's a kitchen, I guess?**

A It is a kitchen.

Q **Does just the working area consist of more than the kitchen? Her working area, Ms. Vance's working area.**

A No, it didn't

Q **How big is the kitchen?**

A It's a small kitchen.

Q **Is it one room?**

A It's basically one room but divided by stainless tables, a column. We have-- if it's broken up into areas, I would probably say there's one, two, three, possibly four, five areas.

Q **Ms. McVicker was a truck driver?**

A She was.

[101]

Q **So what was there about her job that would cause her intermittently to come in contact with Ms. Vance in the kitchen you just described?**

A Well, part of the truck driver's responsibility is to pick up the carts that are going to an off-site function or a delivery, and it's her responsibility to go to the kitchen, pick up the carts. So potentially if Maetta was walking around where the cart -- where we loaded carts and by the elevator, there's a chance they're going to come in contact.

Q **Okay. Is there anywhere else – if Ms. Vance is a part-time catering assistant, is there anywhere else in UBC you**

could have relocated her work to that would cause her not to come in contact with McVicker on those occasions when McVicker came to pick up food?

A No.

Q And if McVicker is a truck driver, would the nature of her duties always require at least some intermittent presence in the kitchen to pick up the food?

A Yes.

Q Within your control as the supervisor in UBC, were there any other working areas or types of

[102]

jobs that were available as locations to send either one of these women back in the fall of '05?

A No.

Q You have the kitchen that prepares food?

A A small kitchen that prepares food.

Q You have trucks that move it to other sites?

A Yes.

Q And then those other sites vary from day to day, week to week, depending upon who is having a function, I guess; would that be true?

A Yes.

Q The last thing I wanted to ask you about is the statement of Patsy Amos. That's Plaintiff's 5. Can you locate that?

A Okay.

Q Have you ever seen this statement before today?

A No.

Q Has Patsy Amos ever been identified to you before today as a witness with potential knowledge of hostile comments by McVicker towards Ms. Vance?

A Not to my knowledge, no.

Q When you interviewed Ms. Vance in the fall of 2005, did she identify Patsy Amos to you as a

[103]

witness with knowledge about hostile comments by McVicker about her?

A Not that I recall.

Q Did Ms. Vance identify anybody as potentially a witness to that information, specifically the information about McVicker calling Ms. Vance a monkey?

A Betty Skinner.

Q And that was in the fall of '05?

A Yes.

Q Did you interview Ms. Skinner then?

A I did.

Q Was she able to confirm then McVicker's comments about Ms. Vance?

A She could not corroborate, no.

Q Since the fall of '05, has Ms. Vance ever come to you with information that Patsy Amos possibly could verify these comments by Connie McVicker about her with respect to calling her a monkey?

A Not to my knowledge, not that I recall, no.

Q You think you'd recall that if she had?

A I would think.

MR. SHOCKLEY: All right, that's all I have. Thanks.

[104]

REDIRECT EXAMINATION,

QUESTIONS BY MR. DAVID E. KRESS:

Q **Mr. Kimes, could Connie McVicker be transferred to another route in dining service where she didn't go to this kitchen or this building in UBC?**

A I don't have that answer for you, no.

Q **Do you have that authority?**

A No, I don't

Q **You're not sure whether Ball State could do that or not?**

A No, I'm not.

Q **Do you know, when chef Rice got terminated, if he got a written warning prior to his termination?**

A I don't recall, no.

Q **Would those documents be either in his employment file or involved in some investigation file related to his termination?**

A I can't answer that, I don't have his file.

Q **Do you maintain employee files?**

A I do.

Q **Okay. Do you have one for chef Rice?**

A I do not.

Q **What's his – is it male?**

[105]

A I'm sorry?

Q **Is chef Rice a male?**

A Yes, Lou Rice.

Q **Bill?**

A Lou Rice.

Q **Lou. Do you still have a file on him?**

A I do not, no.

Q **When employees leave, what do you do with their files?**

A I put them as terminated employees, and I send them over to Karen Adkins.

Q **So you would have sent Lou Rice's file over to Karen Adkins?**

A More than likely I probably would have, yes.

MR. KRESS: I don't have any further questions.

MR. SHOCKLEY: Okay. Thank you. I'd like signature, please. Send it to me.

AND FURTHER THE DEPONENT SAITH NOT.

/s/
WILLIAM KIMES

DEPOSITION OF
DONN KNOX
Dkt. No. 61-10

* * *

[50]

Q. Do you all give directions to student from time to time?

A. Who?

Q. All of those of you who work there?

A. Not really. Occasionally. Occassionally.

Q. As far as your job, you report --

A. The chef is actually my, according to what's on paper, chef is my immediate supervisor.

Q. Shannon?

A. Yes, Shannon it.

Q. And then according to what's on paper, Shannon reports to Bill?

A. I don't know what's on paper, but she reports to Bill. And John is to report to Bill, the truck

driver; I mean he's immediate supervisor. But, see, you also have to keep in mid we have two others; we've got Lisa Fordyce who can give us an order; Anna Lisa who can also, you know, because she's in a supervisor capacity, as well as the chef.

Q. Okay. Let me see if I've got this. Lisa Fordyce and Anna Lisa?

A. Right.

Q. Are?

A. Supervisors.

Q. Supervisors? Shannon the chef would be a supervisor?

[51]

A. Right.

Q. You identified yourself, Maetta, Brad, Patsy and John Estes?

A. Right.

Q. As the --

A. Full-time.

Q. -- full-time?

A. Right.

Q. Saundra, you're not sure how to characterize her?

A. Well, she can't be bargaining unit because she don't clock in. So she's got to be -- I don't know what they've done with her.

Q. Do you know --

A. She used to be a supervisor. I don't know what they call her now.

Q. When was she a supervisor?

A. At UBC.

Q. I know, but I mean what period what -- years?

A. Well, I'm not really sure. She left there. She went down to Cardinal Crossing and then she got a cook job somewhere. I think it was at Woodworth being a cook. Then all of a sudden they bring her from there back to UBC as a supervisor with Betty Skinner, but I'm not -- the years I cannot -- I really can't tell you the exact years. I can only guess. It was while I was there.

[52]

Q. During the first time you were there from '01 to '05 or '99 to '05?

A. But it wasn't the first -- it wasn't in '99, I know. It was maybe a couple -- I'm gonna have to say a couple of years after that that they made her supervisor at UBC, and they brought her from Woodworth. I remember that.

Q. And when you say "they," you mean who, Ann Talley?

A. There's a director, I guess, or Bill or whoever.

Q. And what was your understanding of her responsibilities at that time that caused you to believe she was a supervisor, Saundra?

A. They told her that she was -- they told us she was a supervisor.

Q. Ann Talley or Karen Adkins did?

A. No, Bill Kimes.

Q. Bill Kimes did?

A. Yeah, there was Betty Skinner. She wound up taking Phyllis's job, the lady that I told you got fired.

Q. Right.

A. Well, Saundra actually wound up taking her job is what happened there. And they brought Saundra back into the kitchen.

* * *

BALL STATE UNIVERSITY
FINDINGS AND RECOMMENDATIONS
COMPLAINT OF UNLAWFUL DISCRIMINATION
Dkt. No. 57-9

Findings and Recommendations
Complaint of Unlawful Discrimination
Filed by Maetta Vance against Saundra Davis
August 14, 2007

Introduction

On August 14, 2007, Ms. Maetta Vance filed in the Office of University Compliance a *Complaint of Unlawful Discrimination* against Saundra Davis alleging harassment and intimidation on the basis of race. Vance identifies as the subjects of her complaint discipline and "other" but does not specify further under that subject.

Vance is a full-time Catering Assistant at University Banquet and Catering (UBC); she has been employed at Ball State University since August, 1989 and in this position full-time since January, 2007; she is African-American. Davis is a full time Catering Specialist in UBC and has been employed by Ball State University since 1986; she is Caucasian.

Complaint against Davis

Vance states she and a co-worker were in the elevator at approximately 3:00pm on August 10, 2007, when the door opened on the third floor and Davis was standing there ready to enter the elevator. Vance alleges Davis looked here in the face and said "ohoo-are you scared?" Vance states the tone used by Davis made her feel the comment was a threat and adds that she and her co-worker were shocked Davis made her feel the comment was a threat and adds that she and her co-worker were shocked Davis would make such a comment. Vance states she made no reply to Davis and she and the coworker walked off the elevator. Vance states she did not report this incident to her supervisor, but she did inform the university's Director of Employee Relations as they were in conversation on an unrelated matter the incident.

Response of Davis

Davis denies that she has harassed or intimidated Vance on the basis of race or any basis protected by state and federal law. Davis states she has no recollection of the incident describes by Vance occurring at all. In fact, Davis states that she attempts to avoid looking directly at Vance and that she never directly speaks to Vance.

As to the specific comment Vance alleges Davis made to her, Davis denies that she said anything about being scared and has no recollection of speaking with anyone else near the elevator which the work *scared*

was used or the topic of being scared was being discussed.

Determination

With regard to this specific incident a conflicting account was reported by the co-worker who was with Vance on the elevator. The witness states she recalls hearing Davis say *are you scared* and that it was "like she had a southern accent." The witness adds that she did not see if the comment was directed at Vance and adds the elevator door was only partially open when she heard Davis's voice so she isn't certain if Davis was alone or speaking to someone else. The witness adds that she was not paying attention and she was not looking straight ahead when the elevator door opened.

However, even if the facts were viewed from the perspective most favorable to Vance, the incident would not rise to the level of unlawful discrimination. There is no evidence alleged by Vance or developed in the investigation that suggests the comment, if made, was related in any way to Vance's race. Further, it is important to note that Davis is a co-worker of Vance and as such has no supervisory authority over Vance and cannot impact Vance in terms of her pay, benefits, or job assignments.

Therefore, based upon the investigation of this charge, the Office of University Compliance finds that no reasonable basis exists to support the allegation made by Vance that Davis subjected her to unlawful discrimination.

Retaliation Advisement

Davis is reminded that any action on her part or any act of a third party at her direction for the purpose of retailing against any person cooperating in this investigation, including Vance, will result in disciplinary action up to and including termination.

The Office of University Compliance considers this matter closed.

By: /s/ 8/28/07
Gloria Courtright Date
Associate Director,
Office of University Compliance
Ball State University
Muncie, IN 47306

DEPOSITION OF
GLORIA CARTRIGHT
Dkt. No. 56-16

* * *

[37]

Q Okay. How did she explain it differently?

A Patsy told me she wasn't looking -- she said the elevator door was only partially open. She said she didn't know if Saundra was speaking to someone else or directly -- she didn't know that she was speaking directly to Maetta. She said she made a point of the southern accent like it was teasing or casual. I'm not -- I don't recall exactly what her words were, but she did say that it was like, it was in a southern accent but that the door was only partially open

Q Did Saundra, does Saundra have a southern accent?

A No.

Q And it says, "It is important to note that Davis is a co-worker of Vance and -- has no supervisory authority over Vance." Do you know if that's accurate? Do you know if she doesn't have some supervisor authority in UBC?

A I don't know if she has any supervisor authority. I know she doesn't have any over Maetta.

Q Okay. "And cannot impact Vance in terms of her pay, benefits, or job assignments." Why did you write that?

[38]

A. On Maetta's complaint form, she, she wrote Saundra Davis and then she had the word "supervisor" on there. And I asked Maetta who were the supervisors she implied but didn't name and she told me she didn't mean other supervisors, she meant Saundra Davis, comma, supervisor and she said yes because she was not certain of Saundra's job title and her responsibility. So my point being that Saundra Davis is not Maetta's supervisor and could not impact any of those things that could be determined to be, you know, adverse actions.

Q. Do you think it's not adverse action to intimidate somebody in the workplace?

MR. SHOCKLEY: Objection, that calls for a conclusion in a matter of law. You can answer.

A. I don't think people should be intimidated at work.

Q. Okay. But do you think that's, it would be adverse to your working environment?

MR SHOCKLEY: Same objection.

A. Yes, I think it could be, um-hum.

Q. Was any discipline given to Saundra Davis for

[39]

this incident?

A. This incident?

Q. Yes.

A. No.

Q. Do you think saying are you scared in a southern accent is intimidating?

A. Saundra Davis denies that she said it.

Q. Well, there's a witness that says that she said it independent from Maetta, correct?

A. The witness does not state she heard Davis say that to Maetta.

Q. She said it, correct?

A. But Ms. Davis says she didn't?

Q. Two people say she did and one of them independent, right? I mean, Patsy has no reason to make anything up, does she?

A. Not that I know of.

Q. Assuming she said it, do you think that's a threat?

A. Not necessarily.

Q. Okay. Why not?

A. Well, there could be any number of reasons, I guess. The facts, sir, that I was dealing with is Maetta stated to me that the door opened and Saundra was standing there looking at her and

[40]

said ohoo, are you scared? Patsy Amos does not support that recollection that way and Saundra Davis denies that ever happened.

Q. You know, you're aware that Maetta and Saundra have had a history of problems working together?

A. Yes.

Q. Okay. Knowing that history, do you think that would be perceived as a threat by Maetta if Saundra said it?

A. By Maetta, yes.

Q. You've had, you testified earlier you had, you've had several interviews with Maetta, correct?

A. Um-hum, yes.

Q. Can you describe your dealings with her and her demeanor?

A. She's always been just fine with me.

Q. Respectful?

A. Always.

Q. Polite?

A. Always.

Q. Were you involved in investigating the elevator incident in 2005 between Saundra and Maetta?

A. Yes.

Q. Okay. Tell me about that.

[41]

A. Can I ask you to clarify something?

Q. Sure.

A. There were two reports of elevator incidents.

Q. Okay.

A. Which --

Q. I wasn't aware of that so either one, pick one and we'll go through both.

A. Maetta said -- I don't recall if she was on the elevator but they were, one of them was on the elevator and the other one got in and that Saundra said to Maetta, "I'll do it again," or -- I believe that's what she said, "I'll do it again."

Q. Something along those lines?

A. Um-hum, something along those lines. And that was included in the first complaint she filed that I was involved in. Again, Saundra denies this exchange. There were no witnesses.

* * *

VERIFIED STATEMENT OF AMY GEESAMAN
Dkt. No. 75-27

VERIFIED STATEMENT OF AMY GEESAMAN

I, Amy Geesaman, being duly sworn upon my oath, hereby state as follows, based on my own personal knowledge:

1. I am over 18 and competent to testify herein.

2. In 1999, I was an employee at Ball State in University Banquet & Catering ("UBC").

3. Brad Hutson, Maetta Vance, and Saundra Davis were all employee's of UBC in 1999 and I worked in close proximity with each of them.

4. In 1999, I was sitting with Brad Hutson, and Saundra Davis approached us crying. I asked Saundra Davis why she was crying and she said, "I just hit Maetta."

5. I understood Saundra's comment meant that Saundra Davis had hit Maetta Vance.

6. I was employed at the University Banquet and Catering until February, 2006.

7. Saundra Davis left UBC for a period of time, and then returned in approximately 2002 or 2003.

8. At the time Saundra Davis returned to University Banquet and Catering, Maetta informed me that Maetta and Saundra should not be left alone together, based on Saundra Davis previously hitting Maetta.

9. Maetta was very upset that Saundra Davis had returned to UBC because of the previous incident where Davis had hit Vance.

10. While I was employed at UBC, I heard Connie McVicker use the "N" word towards Maetta Vance.

11. I informed Bill Kimes in 2005 that I heard Connie McVicker use racially derogatory language towards Maetta Vance.

12. After the time that I informed Mr. Kimes of Ms. McVicker's statements towards Vance, neither Ms. McVicker nor Ms. Vance were separated, and Vance and McVicker continued to work in close proximity to each other.

FURTHER AFFIANT SAYETH NOT.

I verify under the penalties of perjury that the foregoing statements are true and correct.

10/1/07
Date

/s/
Amy Geesaman

AFFIDAVIT OF BETTY SKINNER
Dkt. No. 59-6

* * *

AFFIDAVIT OF BETTY SKINNER

Betty Skinner, being first duly sworn upon her oath states:

1. I am over 18 years of age and competent to testify.

2. I worked in University Banquet and Catering ("UBC") at Ball State University from approximately 1986 until December, 2005.

3. While at UBC, I worked as a Catering Specialist and worked with Maetta Vance.

4. At all times relevant herein, Bill Kimes, UBC General Manager, served as my immediate supervisor.

5. During the Fall of 2005, Bill Kimes explained to me that he had received a complaint that Connie McVicker, UBC Truck Driver, had called Maetta Vance a "monkey." Bill Kimes asked me if I heard Connie McVicker make such a comment.

6. I told Bill. Kimes that I did not hear Connie McVicker call Maetta Vance a "monkey."

7. During my employment at UBC I never saw or heard Bill Kimes treat Maetta Vance different than the other employees at UBC.

8. During my employment at UBC I never saw or heard Bill Kimes say or do anything, in general or toward Maetta Vance, to indicate he is a racist or that he discriminated against others based on their race.

9. While working at UBC, I worked with Saundra Davis, who also served as a Catering Specialist.

10. It was apparent that there was a personality conflict between Maetta Vance and Saundra Davis and they both avoided each other while at UBC.

11. During my employment at UBC I never heard or saw Saundra Davis say or do anything, in general or to Maetta Vance, to indicate she is a racist or that she discriminated against others based on their race.

12. I did not perceive the environment at UBC as racially hostile; rather the environment was tense at times because of personality conflicts between employees.

I declare under penalties of perjury that the foregoing statement is true and accurate to the best of my knowledge and belief.

/s/
Betty Skinner

* * *

DEPOSITION OF
BUTCH PARKER
Dkt. No. 62-11

* * *

[21]

anybody lives with women; that's why I don't." I'm married. I live with a woman. What if I said, "I don't see how anybody lives with a man." That would be gay bashing, but he seemed to have a carte blanche on that, you know. He would say anything at any time, and...

Q. There's some specific issues in this case about how a couple of co-workers, the relationship between Maetta and a couple of co-workers, specifically Connie McVicker is one. Did you ever see anything between Connie and Maetta happen?

A. No.

Q. Okay. You were there, I guess, in the year of 2006?

A. Right.

Q. Did anybody report to you anything Connie McVicker was saying about Maetta? Did you

ever hear anything she was saying about Maetta during the time --

A. During the time?

Q. -- during the time you were working there?

A. Yeah, not the stuff that happened before I got there?

Q. Not what happened before you got there?

A. No, no.

Q. Did you ever see any conflict during the year you worked there between Saundra Davis and Maetta?

A. Not that I saw, just those people didn't speak to each

[22]

other, and, like, if I was involved, they would tell me to say this to that person because, you know, they didn't communicate directly.

Q. They'd use you as a conduit?

A. There you go.

Q. Was Dave Ring working there when you were?

A. Yes, he was.

Q. Did he have conflict with Bill?

A. Yeah.

Q. Was he intimidated by Bill or did Bill attempt to intimidate him?

A. I think so. With, like I said, his sense of how long it would take you to do something was unmerciful; it was unreasonable, and he was in no position to go into detail then, but he runs a health food store here downtown now and we see each other, and he said, "Can you imagine with you being a service employee what it was like trying to be management under him?" I said, "Yeah, I can imagine."

Q. So Ring told you he had some of the same problems with Bill?

A. Unfavorable working conditions. Yeah, sure did.

Q. Did Bill seem to have a problem with his power, Bill Kimes, with his power over his employees?

A. Can you rephrase that, did he have a problem?

* * *

AFFIDAVIT OF MELISSA RUBRECHT
Dkt. No. 56-1

* * *

AFFIDAVIT OF MELISSA RUBRECHT

I, Melissa Rubrecht, Rubrecht, am over the age of 21. I make the following statements, under oath, on first-hand knowledge, freely and voluntarily.

1. I am the Director of Employee Relations at Ball State University. I have served in this position since July 1, 2006. Before that I served as Assistant Director of Employee relations for fifteen years.

2. University Dining Services at Ball State is a large and complex operation. Approximately 6,900 employees work at Ball State. Approximately 850 of them work in Dining services across seven residence hall dining units and other restaurants on campus. These positions include: food preparation, wait staff, purchasing, truck driving, maintenance, custodial, chef, sous chef, stock clerk, and the like. The operation is headed by its Director, Jon Lewis. Karen Adkins is Assistant Director of Personnel, Training, and Administration and reports to Lewis. Dining Services serves thousands of meals every day across the BSU campus. Non-supervisory full-time service personnel are governed by a collective bargaining agreement between Ball State and different locals of several labor unions. At-

tached to this Affidavit is an organization chart of RHDS.

3. University Banquet and Catering (UBC) is one division of Dining Services. Its General Manager since 2001 has been Bill Kimes. Kimes oversees UBC as well as Cardinal Crossing, a restaurant that serves student and employee meals in a food court setting.

4. Kimes supervises nearly 140 employees. Approximately 60 of these employees are in UBC; three of them are supervisors who report directly to him: Lisa Fordyce (UBC Sales & Service Supervisor), Ana Lisa Padron (UBC Sales & Service Supervisor), and Shannon Fultz (Banquet & Catering Chef/Supervisor).

5. Kimes also supervises approximately 80 employees in Cardinal Crossing, two of whom are supervisors: Fran Percy (food service supervisor) and Tina Swift (assistant manager). The non-supervisory full-time personnel are members of AFSCME, Local #293 and are governed by a collective bargaining agreement.

6. Bargaining unit employees, such as Maetta Vance, may bring complaints about working conditions to the office of Employee Relations. I have been involved in Vance's complaints and have coordinated Employee Relations' efforts with the Office of Compliance where Vance's complaints have overlapped the two offices. Any complaint involving allegations of discrimination or harassment in the work-

place, however, is handled by the Office of Compliance.

7. All full-time employees receive new positions by a bidding process governed by the collective bargaining agreement.

8. I am responsible for maintaining documents generated and kept by the Office of Employee Relations in the ordinary course and scope of my employment. These documents are maintained in an orderly and systematic manner at or near the time of their creation or receipt. I have reviewed the exhibits accompanying the summary judgment brief in this case and affirm that those issuing from or maintained by the Office of Employee Relations are authentic copies.

9. Saundra Davis is not now, and never has been, a supervisor at Ball State. At all pertinent times she has been an hourly employee serving as a catering specialist. See Tab XX (Davis's Job Description). A "supervisor" at Ball State is a person who has authority to exercise all, or substantially all, of the following powers: to hire, fire, demote, promote, transfer, or discipline an employee. Saundra Davis does not have, nor has she ever had, such authority.

10. In the course of investigating Vance's complaints since the fall of 2005, I have heard that Saundra Davis once "slapped" or "hit" Maetta Vance. The "slap" is part of workplace rumor or "folklore." I have no independent knowledge of the

incident occurring. In the course of my investigation, I have interviewed hourly and management employees — including Bill Kimes and Karen Adkins — about the alleged incident and none has any knowledge of the incident other than rumor. My office has no record of the incident ever occurring.

AND FURTHER AFFIANT SAYETH NAUGHT.

/s/
Melissa Rubrecht

* * *

AFFIDAVIT OF KAREN ADKINS
Dkt. No. 59-10

* * *

AFFIDAVIT OF KAREN ADKINS

I, Karen Adkins, am over the age of 21. I make the following statements under oath, on first-hand knowledge, freely and voluntarily under penalty of perjury.

1. At all times pertinent to this lawsuit I have served as the Assistant Director of Residence Halls Dining Services at Ball State University.

2. Until January 2007, Maetta Vance had served as a part-time catering assistant. In December 2006, I offered Vance a full-time position as a catering assistant effective January 2, 2007. Promotion to the full-time position included an increase in pay to $12.51 per hour and a benefits package worth $9,492 per year. See attached pp. BSU 00978-979.

3. During the course of Ball State's investigations of Vance's complaints since the fall of 2005, I became aware of rumors that Saundra Davis once "slapped" or "hit" Maetta Vance. The "slap" has become part of workplace rumor. I have heard that Vance says that she complained of the slap to me and

to Bill Kimes. I have heard that she says she came to Bill's office and met with Bill and me, and even that she demonstrated how Davis slapped her by slapping Bill in the same manner. I have no memory of the incident or the interview occurring. I have no independent knowledge of the incident occurring. I have spoken with others, including Bill Kimes, about the rumor, but no one I have spoken with has knowledge of the alleged incident.

AND FURTHER AFFIANT SAYETH NAUGHT.

/s/
Karen Adkins

* * *

VERIFIED STATEMENT
OF DANELLE ANDERSON
Dkt. No. 75-35

* * *

VERIFIED STATEMENT OF DANELLE ANDERSON

I, Danielle Anderson, being duly sworn upon my oath, make the following statements based on my own personal knowledge:

1. I am over eighteen (18) and competent to testify herein.

2. I worked at Ball State University in the University Banquet and Catering Department ("University") as the Banquet Lead from 1999 to 2004.

3. During my employment at the University, I witnessed Bill Kimes regularly curse at Maetta Vance, including using the "f" word towards Maetta.

4. On several occasions, Bill Kimes cornered Maetta Vance, and lifted his arms up so that he was blocking her way.

5. I regularly witnessed Bill Kimes screaming at Maetta Vance, and I never witnessed him talking to her in a normal tone of voice.

6. During my employment at the University, I heard Connie McVicker refer to Maetta Vance as a "nigger".

7. During my employment at UBC, the working environment was tense and hostile and Bill Kimes was the cause of this environment.

I verify under the penalties of perjury, that the foregoing statements are true and correct.

FURTHER AFFIANT SAYETH NOT.

11/20/07	/s/
Date	Danielle Anderson

AFFIDAVIT OF MAETTA VANCE
Dkt. No. 75-24

* * *

AFFIDAVIT OF MAETTA VANCE

I, Maetta Vance, being duly sworn upon my oath, make the following statements based on my own personal knowledge:

1. I am over 18 years of age and competent to testify herein.

2. I have worked at the University Banquet and Catering Department ("UBC") at Ball State University ("University") since 1989.

3. From approximately 1999 through the end of 2006, I worked primarily as a baker at UBC.

4. UBC is a division of Dining Services.

5. There are no African-American supervisors in Dining Services.

6. I am the only African-American working at UBC in the kitchen.

7. In 2003, soon after Bill Kimes informed an African-American employee, Greta May, that there was no work available in UBC, Bill Kimes

hired a white employee to work in the UBC, believed to be named Russell Adams.

8. I have complained to the University that Connie McVicker has referred to me as a nigger, monkey, laughed at me, stared at me, mumbled under her breath, and followed me around when I have to encounter her.

9. Connie McVicker currently works at the University at Cardinal Crossing in an area where I have to encounter her on a regular basis in my duties collecting food product.

10. Bill Kimes yells at me, laughs at me, and gives me inferior assignments and fewer hours than white employee Brad Hutson, despite the fact that I trained Brad hutson when he began working in UBC.

11. Saundra Davis hit me in 1999.

12. In 2005, Davis said "I'll do it again" in the elevator. I interpreted this comment to mean that she would hit me again.

13. In August, 2007, Saundra Davis said, "are you scared" in a southern accent and in an intimidating manner to me near the elevator.

14. Since Saundra Davis said "I'll do it again", and "are you scared", I continue to have to work in close proximity with her.

15. I have complained about the harassment by McVicker and Davis to my supervisor, Bill Kimes, to his supervisor, Karen Adkins, to her supervisor, John Lewis, and to the University Office of Compliance.

16. I have continuously complained about the harassment by Kimes to his supervisor, Karen Adkins and to the University Office of Compliance.

17. Adkins smiled at me, looked at me menacingly and took no action when I complained about the harassment by McVicker, Davis, and Kimes.

18. I have complained about Karen Adkins treatment of me to the University Office of Compliance.

19. The harassment by McVicker, Davis, Kimes, and Adkins has made the work environment hostile and I have complained about this environment to the University Office of Compliance.

20. The hostile work environment has caused me to take unpaid leave from work.

21. I have been certified as having a serious health condition, and the University has approved my unpaid leave based on this serious health condition.

22. The harassment continues on a daily basis. It includes McVicker, Davis, Kimes and Adkins, smiling and laughing at me.

23. I have attended regular therapy sessions due to the racially hostile environment I have to endure at work.

24. The treatment by Connie McVicker, Bill Kimes, Karen Adkins, and Saundra Davis has made it very difficult for me to perform my job.

25. Connie McVicker continues to laugh at me, stare at me, and mumble under her breath when I am forced to encounter her in my job.

26. Saundra Davis continues to smile at me menacingly, come into my work area, and harass me.

27. I never said, "this is just the beginning, bitch" to Connie McVicker or called her a bitch at any time.

28. I never informed Connie McVicker that she had better watch her house.

29. In 2007 I have not been allowed to perform the baking, despite the fact that I am the most experienced and qualified person to do the baking at UBC.

30. I routinely received compliments on my work from clients and co-workers when I was allowed to perform the baking.

31. Saundra Davis is currently doing the baking, and there are frequently problems with her cooking.

32. On September 28, 2007, I was disciplined by the University for banging the pots and pans too loudly, and for throwing or splattering gravy on Saundra Davis.

33. I did not throw or splatter gravy on Davis.

34. I did not bang a pan intentionally, or made no more noise than is customary for the work in the UBC kitchen.

35. There were no witnesses that have stated that they have seen me throw or splatter gravy on Davis.

36. No one from the University asked me about any alleged throwing or splattering gravy on Saundra Davis on the date that it happened, but waited four days to talk to me about it. During this meeting, they never even asked me if I threw or splattered food on Davis. At the end of the meeting, I was not certain what the purpose of the meeting was, because they never asked me direct questions, only the hours that I worked and the duties that I performed that day.

37. Despite the fact that no witnesses saw me throw or splatter food on Davis and the fact that I informed Karen Adkins and Jon Lewis that I did not throw or splatter food, the University disciplined me for something that never happened.

I verify under penalties of perjury, that the foregoing statements are true and correct.

FURTHER AFFIANT SAYETH NOT.

11/28/07 /s/
Date Maetta Vance

* * *

VERIFIED STATEMENT OF TRACEY MILLER
Dkt. No. 75-45

VERIFIED STATEMENT OF TRACEY MILLER

I, Tracey Miller, being duly sworn upon my oath, make the following statements based on my own personal knowledge:

1. I am over eighteen (18) years of age and competent to testify herein.

2. I work in the University Banquet and Catering ("UBC") at Ball State University as a catering assistant and have worked in such capacity since March, 2007.

3. Bill Kimes, UBC's general manager, serves as my supervisor.

4. On November 22, 2007 ("Thanksgiving Day"), I worked a shift at the UBC, and worked closely with Maetta Vance.

5. During this shift I saw Bill Kimes regularly come into our area to check on Maetta's progress, and he seemed to come around more than was necessary for Maetta to perform her daily tasks.

6. I saw Kimes come into our area to the point that it made Maetta uncomfortable, and Kimes caused Maetta to be very upset.

7. At this point Maetta asked if she could speak with Lisa Fordyce and Bill Kimes said no.

8. There was no basis for Bill Kimes to state that Vance could not speak with Lisa Fordyce because it was clear that Vance was upset and that speaking with Lisa would have helped the situation.

9. On October 23, 2007, I signed a statement that said I had not seen Kimes treat Vance differently than other UBC employees. This statement was true at the time I made it, but is no longer true.

10. On this Thanksgiving Day shift, I saw Bill Kimes treat Maetta Vance differently than other UBC employees who were working that day, including Brad Hudson and Maria Julius.

11. Bill Kimes' treatment of Maetta Vance on Thanksgiving Day made the workplace very stressful.

12. Bill Kimes' treatment of Maetta Vance caused Vance to be upset throughout the entire shift and impacted her ability to do her job.

FURTHER AFFIANT SAYETH NOT.

I verify under the penalties of perjury, that the foregoing statements are true and correct.

11/29/07
Date

/s/
Tracey Miller

AFFIDAVIT OF BILL KIMES
Dkt. No. 87-1

* * *

AFFIDAVIT OF BILL KIMES

Bill Kimes, being first duly sworn upon his oath states:

1. I am over 18 years of age and competent to testify.

2. I work as the General Manager of University Banquet and Catering ("UBC") and Cardinal Crossing at Ball State University ("BSU").

3. As General Manager of UBC, I am responsible for scheduling the hours of all UBC employees.

4. Every Friday, I prepare the UBC schedule for the following week, Sunday to Sunday.

5. I generally schedule Maetta Vance to work 5 days each workweek.

6. The UBC schedule is based on the needs of the unit, including the number of events scheduled for a particular week, the size of the events, and the number of hours each event is likely to take.

7. Maetta Vance has taken intermittent Family and Medical Leave Act ("FMLA") leave since March 2006.

8. In taking FMLA time, Maetta Vance will sometimes call in prior to the start of her shift and leave a message indicating that she will be absent pursuant to her FMLA leave. Other times, Maetta Vance will notify a UBC supervisor during her shift that she is leaving immediately pursuant to her FMLA certification.

9. Maetta Vance's FMLA absences are unpredictable and typically allow for little or no notice.

10. From January 1, 2007 until October 29, 2007, Maetta Vance took FMLA time during all or part of 70 days that she was scheduled to work.

11. The document labeled Defendants' Exhibit DDD is a true and accurate copy of Maetta Vance's Absence Log prepared by other UBC supervisors and me and maintained in the ordinary course of my employment as General Manager of UBC.

12. On August 28, 2007, Maetta Vance was offered overtime but declined to accept the overtime.

I declare under penalties of perjury that the foregoing statement is true and accurate to the best of my knowledge and belief.

/s/
Bill Kimes

* * *

AFFIDAVIT OF SHANNON FULTZ
Dkt. No. 87-3

* * *

AFFIDAVIT OF SHANNON FULTZ

Shannon Fultz, being first duly sworn upon his oath states:

1. I am over 18 years of age and competent to testify.

2. I work as a Chef in University Banquet and Catering ("UBC") at Ball State University and have worked in such capacity since January, 2007.

3. Bill Kimes, General Manager of UBC, serves as my immediate supervisor.

4. As the Chef in UBC, I am the immediate supervisor of all UBC kitchen employees including Maetta Vance, Brad Hutson and Saundra Davis.

5. My duties as Chef include preparing daily "prep sheets" for the UBC kitchen employees. In February, 2007 I began saving the computer generated prep sheets I prepared for UBC.

6. The documents labeled Defendants' Exhibit JJJ and Defendants' Exhibit LLL are true and accurate copies of the daily prep sheets for Brad Hutson and Maetta Vance, respectively, that I prepared and

maintained in the ordinary course of my employment as UBC Chef.

7. Bill Kimes is not involved in the creation of the daily prep sheets; nor does he review the prep sheets before I distribute them to the UBC employees.

8. In preparing the prep sheets, I refer to the schedule to determine who is working on a particular day. I also consult the UBC catering functions for a particular day and the days immediately following to determine what tasks need to be completed.

9. I do not differentiate between the duties I assign to the two full-time Catering Assistants, Maetta Vance and Brad Hutson. Both employees are assigned the duties that are included in their job descriptions; and the types assignments given to each employee are identical or similar in nature.

10. Maetta Vance takes intermittent leave pursuant to the Family and Medical Leave Act "FMLA". In taking FMLA time, Maetta Vance will sometimes call in prior to the start of her shift and leave a message indicating that she will be absent pursuant to her FMLA leave. Other times, Maetta Vance will notify a UBC supervisor during her shift that she is leaving immediately pursuant to her FMLA certification.

11. Because Maetta Vance's leave is intermittent in nature, I usually receive little or no notice of her

need to be absent pursuant to her FMLA leave. As such, I often have to reassign her duties to another UBC employee after learning that she will be absent or is leaving mid-shift.

12. Connie McVicker, a former UBC truck driver, transferred from her UBC position on the second floor to a position in Cardinal Crossing on the first floor. Since her transfer, Connie McVicker does not come to the second floor where Maetta Vance works.

13. Maetta Vance rarely has a work-related reason to be on the first floor, only occasionally going there, for less than a few minutes at a time, to gather food from a freezer. She may also go to the first floor while taking her break.

I declare under penalties of perjury that the foregoing statement is true and accurate to the best of my knowledge and belief.

/s/
Shannon Fultz

* * *

SUPPLEMENTAL AFFIDAVIT OF MAETTA VANCE
Dkt. No. 103-4

* * *

SUPPLEMENTAL AFFIDAVIT OF MAETTA VANCE

I, Maetta Vance, being duly sworn upon my oath, make the following statements based on my own personal knowledge:

1. I am over eighteen (18) years of age and competent to testify herein.

2. I have consistently been assigned the most menial tasks in the kitchen, such as preparing salads and cutting fruit since I became a full-time employee in January, 2007.

3. Brad Hutson Consistently get to be the "lead cook" and performs the majority of the cooking with the assistance of Saundra Davis and part-time employees.

4. I am not provided any part-time employees to assist me in my work.

5. The daily prep sheets are not always followed in practice, as they can be reassigned by Chef Shannon Fultz or by Bill Kimes.

6. Bill Kimes has the overall supervision in the kitchen as he often reassigns people to perform different tasks.

7. Bill Kimes controls the schedule and gives less opportunity and overtime to me than he gives to Brad Hutson.

8. There have been multiple times when I have been performing a task that needed to be completed that would have required me to perform overtime.

9. I have been informed on those multiple occasions that I was not to complete the task and that another person would complete it.

10. Brad Hutson consistently receives more overtime hours than I do, and these do not just involve "work continuation."

11. On many occasions, Brad Hutson is asked to come into work earlier than his scheduled start time, and he stays until his scheduled end time or longer, which provides him overtime.

12. I have asked Ms. Fultz to allow me to come in early to obtain overtime hours. Ms. Fultz has responded to my requests by stating either that she has to ask Bill Kimes or by informing me that she forgot to ask me.

13. On only one occasion have I been asked to come in early to obtain overtime hours.

14. The University has provided me an overtime equalization chart for Brad Hutson and myself. This document reflects that I refused two hours of overtime on August 28, 2007 and on November 12, 2007. This is false. I did not refuse overtime on either of these dates.

15. During all instances when I have complained of harassment and discrimination to various officials at Ball State University, none of them has ever stated that they were sorry about my treatment.

16. No person has ever apologized to me for having to endure Sandra Davis and Connie McVicker laughing and staring at me.

17. No person from the University has apologized to me for Saundra Davis saying, "are you scared" in a southern accent to me near the elevator.

18. No person from the University has apologized to me for the racist statements Connie McVicker has made about me.

FURTHER AFFIANT SAYETH NOT.

1/16/08 /s/
Date Maetta Vance

* * *

SUPPLEMENTAL AFFIDAVIT OF MAETTA VANCE
Dkt. No. 124-1

* * *

SUPPLEMENTAL AFFIDAVIT OF MAETTA VANCE

I, Maetta Vance, being duly sworn upon my oath, make the following statements based on my own personal knowledge:

1. I am over eighteen (18) years of age and competent to testify herein.

2. This Affidavit supplements the previous affidvits that I signed on November 28, 2007 and January 16, 2008 that were submitted as Exhibits 21 and 44 to the summary judgment briefs.

3. On March 1, 2008, I was on a break with a fellow employee, Donn Knox.

4. While on our break, Saundra Davis and her daughter, Amanda, were walking past us.

5. I looked over at them and Amanda asked me, "what the fuck are you looking at?

6. Amanda then went to her car and sat for about 4 minutes.

7. Amanda then got out of the car, approached me and started yelling loudly, "you are a nigger, a fucking nigger. You are trying to get my mother fired. What are you gonna do about it? I'll kick your ass." She was close enough while she was yelling this that I could feel her breath.

8. Saundra Davis was present at the car the entire time that her daughter Amanda was yelling at me as described above and was laughing while Amanda was yelling these statements.

9. While Amanda was yelling at me, Saundra's husband, Richard, got out of a car and got into Donn Knox's face and said Donn was a "backstabbing nigger lover".

10. Richard Davis then threatened Donn Knox. Saundra was present at the car while Richard Davis was yelling these statements and threatening Donn.

11. The entire Davis family's tone and demeanor was threatening and I felt as if they were going to physically harm me.

12. Donn Knox was with me and also felt as if they were trying to cause us to respond to them so that they could physically harm us.

12.5 I reported the incident to my supervisor Bill Kimes, and he responded by saying "get out of my face."

13. On February 18, 2008, Sarah Oakes wrote a letter in the Ball State Newspaper that I was a racist and made several untrue and defamatory statements about me.

14. In the morning of March 1, 2008, Sarah Oakes, a friend of Saundra Davis, was lurking in my work area, banging things loudly, and acting to intimidate me..

15. I reported that I felt unsafe based on Oakes' actions, and I was told by supervisor Ana Lisa Padron that "this is a common kitchen."

16. I told Ana Lisa that due to Oakes' behavior that I felt unsafe and was going to call the police.

17. After I informed Ana Lisa of my intention to call the police, Ana Lisa escorted Sarah Oakes out of the kitchen.

FURTHER AFFIANT SAYETH NOT.

I verify under the penalties of perjury, that the foregoing statements are true and correct.

3/11/08 /s/
Date Maetta Vance

* * *

BALL STATE UNIVERSITY
EQUAL OPPORTUNITY AND
AFFIRMATIVE ACTION POLICY
Dkt. No. 56-13

EQUAL OPPORTUNITY AND AFFIRMATIVE ACTION POLICY

Ball State University provides equal opportunity to all employees and applicants for employment in its recruitment, hiring, retention, promotion, tenure, transfer, layoff, return from layoff, training, and other employment decisions and in its compensation and benefits programs without regard to race, religion, color, sex (except where sex is a bona fide occupational qualification), sexual orientation, physical or mental disability, national origin, ancestry, age, or citizenship (for U.S. citizens and protected lawfully-admitted aliens).

The University also takes affirmative action to employ and advance minorities, women, qualified disabled person, and qualified disabled veterans and veterans of the Vietnam era. Information concerning the University's affirmative action programs can be obtained from the Office of Equal Opportunity and Affirmative Action, Ball State University, Muncie, IN 47306.

Each line administrator is responsible for ensuring that educational and employment decisions are made and implemented in accordance with the

University's equal opportunity and affirmative action policy. All persons involved in the decision-making process, including members of faculty and other employee committees, shall act in a non-discriminatory manner. The Director of Equal Opportunity and Affirmative Action is responsible for developing, coordinating, and implementing policies and procedures for institutional compliance with all applicable federal and state equal opportunity laws and regulations and for preparing and monitoring compliance with required affirmative action programs.

Complaints regarding unlawful discrimination should be filed within 45 calendar days following the alleged act or incident giving rise to the complaint in the Office of Equal Opportunity and Affirmative Action in accordance with the "Ball State University Office of Equal Opportunity and Affirmative Action Complaint Investigation Procedure and Appeal Process." A copy of this document may be obtained by contacting the Office of Equal Opportunity and Affirmative Action.

The President will review the University's equal opportunity and affirmative action policy and programs at least once each year, measure progress against the objectives stated in the affirmative action programs, and report findings and conclusions to the Board of Trustees.

BALL STATE UNIVERSITY'S STATEMENT ON SEXUAL HARASSMENT

1. Harassment on the basis of sex is a form of illegal sex discrimination. Sexual harassment in employment violates Title VII of the Civil Rights Act of 1964, as well as state law. Student-on-student sexual harassment and sexual harassment directed toward a student by a University employee violates the Title IX of the Education Amendments of 1972.

2. Ball State University will not tolerate sexual harassment of students or employees by members of its faculty or staff or its students or by other agents of the University and will respond in a suitable manner to every complaint

3. The University has adapted the Equal Employment Opportunity Commission (EEOC) definition of sexual harassment for our academic community: Sexual harassment is defined as any unwelcome sexual advance, request for sexual favor or other unwelcome verbal or physical conduct of a sexual nature, whether committed on or off campus, when:
   3.1 submission to such conduct is made, either explicitly or implicitly, a term or condition of an individual's employment or participation in a University-sponsored education program or activity;

3.2 submission to or rejection of such conduct by an individual is used as the basis or threatened to be used as the basis for employment decisions or academic decisions or assessments affecting an individual; or

3.3 such conduct has the purpose or effect of unreasonably interfering with an individual's work or academic performance or creating an intimidating, hostile or offensive working or educational environment. Such conduct will typically be directed against a particular individual or individuals and will either be abusive or severely humiliating or will persist despite the objection of the person targeted by the speech or conduct

Sexual harassment includes but is not limited to situations where one person has authority over another. In such situations, sexual harassment is particularly serious because it may unfairly exploit the power inherent in a faculty member's or supervisors position.

4. Sexual harassment can be verbal, visual, physical or communicated in writing or electronically. Some conduct obviously constitutes sexual harassment—such as a threat that a grade or promotion will depend on submission to sexual advance. But whether particular conduct constitutes sexual harassment will often depend upon the specific context of the situation, including the participants' reasonable

understanding of the situation, their past dealings with each other, the nature of their professional relationship (e.g., supervisor-subordinate, colleague, etc.) and the specific setting. The inquiry can be particularly complex in an academic community, where the free and open exchange of ideas and viewpoints preserved by the concept of academic freedom may sometimes prove distasteful, disturbing or offensive to some. Sexual harassment must be distinguished from behavior which, even though unpleasant or disconcerting, is appropriate to the carrying out of instructional, advisory, or supervisory responsibilities. Instructional responsibilities, in particular, require appropriate latitude for pedagogical decisions concerning the topics discussed and methods used to draw students into discussion and full participation.

5. Examples of conduct which may constitute sexual harassment include but are not limited to:

5.1 request for sexual favors;

5.2 unwelcome physical contact such as hugging, rubbing, touching, patting, pinching, or brushing another's body;

5.3 veiled suggestions of sexual activities;

5.4 requests for private meetings outside of class or business hours for other than legitimate academic or business related purposes;

5.5 use in the classroom of sexual jokes, stories or images in no way germane to the subject of the class;

5.6 use in the workplace of sexual jokes, stories or images in no way germane to the subject of the work environment;

5.7 remarks about a person's body or sexual relationship, activities or experience that are in no way germane to the subject of the work or academic environment;

5.8 use of inappropriate body images to advertise events.

6. Members of the University community can expect to be free from sexual harassment and thus all members of the University community should guard against it The fact that someone did not intend to sexually harass an individual is generally not considered a sufficient defense to a complaint of sexual harassment, although the reasonableness of the accused's perceptions may be considered. In most cases, it is the effect and characteristics of the behavior on the complainant and whether a reasonable person similarly situation would find the conduct offensive that determine whether the behavior constitutes sexual harassment

7. The University will not tolerate retaliation or discrimination against persons who report or charge sexual harassment or against those who testify, assist or participate in any investigation, proceeding or hearing involving a

complaint of sexual harassment. In this context, retaliation means speech or conduct that adversely affects another's terms or conditions of employment or education and is motivated by an intent to harm the targeted person because of his or her participation in the filing or investigation of an allegation of sexual harassment. Any such retaliation—or encouragement of another to retaliate—is a serious violation of University policy and law, independent of whether the particular claim of sexual harassment is substantiated. Anyone who believes he or she has been subjected to retaliation in violation of this rule may use the procedures described in this policy to complain and seek redress.

8. Any member of the University community who believes he or she is being sexually harassed or is being retaliated against is encouraged to contact the Office of Equal Opportunity and Affirmative Action and make a complaint. The complaint will be investigated in accordance with the "Equal Opportunity and Affirmative Action Complaint Investigation Procedure and Appeal Process." A copy of this document may be obtained by contacting the Office of Equal Opportunity and Affirmative Action.

9. The University can respond to specific instances and allegations of harassment only if it is aware of them. The University therefore encourages anyone who believes that he or

she has experienced sexual harassment to come promptly forward (typically within 45 calendar days) with inquiries, reports or complaints and to seek assistance from the Office of Equal Opportunity and Affirmative Action. In addition, any University employee who becomes aware of instances or allegations of sexual harassment by or against a person under his or her supervisory authority must report them to the Office of Equal Opportunity and Affirmative Action. It shall be the responsibility of the Office of Equal Opportunity and Affirmative Action to respond to allegations and reports of sexual harassment or refer them to other University officials for an appropriate response.

10. Any dean, chairperson, director or department head or other similar administrator who becomes aware of information indicating a significant likelihood of sexual harassment must report such information to the Office of Equal Opportunity and Affirmative Action. These administrators must respond not only when they receive a specific complaint or report alleging improper activity, but also when such matters come to their attention informally. Unconfirmed or disputed allegations should be clearly labeled as such and reports should indicate any steps already taken to respond. Administrators should consult the Office of Equal Opportunity and Affirmative Action prior to responding to any situation involving alleged harassment.

11. Possible sanctions for a person found engaging in behavior which is in violation of this policy include but are not limited to the following:
    - 11.1 oral or written reprimand, placed in personnel file;
    - 11.2 required attendance at a sexual harassment sensitivity program;
    - 11.3 an apology to the victim;
    - 11.4 loss of salary or benefit, such as sabbatical or research or travel funding;
    - 11.5 transfer or change of job, class or residential assignment or location (i.e., removing the person from being in a position to retaliate or further harass the victim);
    - 11.6 demotion
    - 11.7 suspension, probation, termination, dismissal or expulsion.

    While counseling is not considered a sanction, it may be offered or required in combination with sanctions. Where alcohol/drugs are involved in the harassment, such counseling may include a substance abuse program.

    If students or student groups are guilty of sexual harassment, any of the sanctions set forth in the "Code of Student Rights and Responsibilities" may also be invoked.

12. The University seeks to protect the rights of all persons, accusers and accused, to fair procedures. Accusations of sexual harassment

frequently have injurious, far-reaching effects on the careers and lives of accused individuals. Allegations of sexual harassment must be made in good faith and not out of malice. Knowingly making a false or frivolous allegation of sexual harassment will be considered a serious violation of University policy.

Approved by the Board of Trustees
December 17, 1999
Revised 8/02

BALL STATE UNIVERSITY
"EMPLOYEE HANDBOOK"
Docket No. 75-15

* * *

5.11 Rules and Regulations--Disciplinary Process

Employment at the university brings many benefits to the employee, but accepting a job at the university also includes accepting the responsibilities that go with the position. For example, tardiness and excessive absenteeism cannot be tolerated. Maintaining the proper decorum and wearing the appropriate attire for the position held and the workstation occupied are required. A satisfactory level of performance on each of the tasks and responsibilities identified in the position description or assigned by the supervisor must be maintained. Reporting to work while under the influence of alcoholic beverages or other controlled substances is unacceptable.

The examples of violations discussed in the above paragraph are meant to be illustrative and should not be considered to be exhaustive. The university supports both a progressive disciplinary policy and performance appraisal system to ensure that deficiencies in either behavior or performance are communicated to the employee by the supervisor. The goal of both the progressive disciplinary policy and the performance appraisal system is to communicate

directly to the employee the patterns of behavior or levels of performance required to continue employment at the university.

The university's progressive disciplinary policy ranges from a verbal warning to discharge. The usual four-step disciplinary procedure is as follows:

Step 1 - Verbal Warning

Step 2 - Written Warning

Step 3 - Suspension (Generally without pay)

Step 4 - Discharge

Because the seriousness of the infraction or the presence of extenuating or aggravating circumstances determines the type of discipline administered, not all four steps of the progressive disciplinary procedure will be exercised in every instance. For example, threatening anyone, fighting, or the theft of employee, student, or university property are particularly serious offenses and may result in the immediate discharge of the offending party.

* * *

9. Failure to properly ring time clock
1 2 3 4

10. Failure to promptly notify supervisor an each day of unscheduled absence
1 2 3 4

11. Using profane or obscene language or gestures
1 2 3 4

12. Violations of minor safety rules and practices
1 2 3 4

13. Misusing, damaging, or destroying University property
1 2 3 4

14. Gambling or possession of gambling devices or paraphernalia on University property
1 2 3 4

15. Insubordination
1 2 3 4

16. Violations of major safety rules or practices
1 2 3 4

17. Sleeping or giving the impression of sleeping during working hours
1 2 3 4

18. Ringing another employee's time card or having one's time card rang by another person
1 2 3 4

19. Falsifying or altering time cards or other records without regard to time of discovery
1 2 3 4

20. Reporting to work while under the influence of alcoholic beverages unlawful controlled substances, counterfeit drugs, misused prescription drugs, or their possession or use/misuse on University property
1 2 3 4

21. Immoral conduct or indecency
1 2 3 4

22. Fighting, assaulting, threatening or attempting bodily harm to anyone on University property
1 2 3 4

23. Unexcused absence of three consecutive days
1 2 3 4

24. Conviction in a civil or criminal court or detention by law enforcement authorities without a reason acceptable to the University
1 2 3 4

25. Theft of employee, University, or student property or unauthorized conversion of employee, University, or student property
1 2 3 4

26. Unauthorized possession of weapons or explosives on University property
1 2 3 4

27. Any other conduct which is inconsistent with behavior
Penalty depends on the circumstances

28. Multiple violations, whether or not simultaneous, of the foregoing rules and regulations
Penalty depends on the circumstances

29. Falsification of employment application without regard
Penalty depends on the circumstances

30. Violation of University Smoking Policy
1 2 3 4

Disciplinary action will not be imposed for violations of rules 1-12 more than three months after the date of the violation unless disciplinary action has previously been taken for violation of the same rule.

GRIEVANCES

An employee should initially direct questions and concerns to his/her immediate supervisor.

* * *

BALL STATE UNIVERSITY
BANQUET AND CATERING STAFF
Docket No. 62-8

Meet Our Staff

Administrative Staff

Director of Campus Dining Services
Jon Lewis

Assistant Director of Personnel, Training and Administration
Karen Adkins

Assistant Director of Operations
Elizabeth Poore

Facilities Manager and Microcomputer/Network Manager
John Hostetler

Manager of Training
Deborah Hutton

Coordinator of Communication, Publications, Research, And Student Retention for Housing and Residence Life And
Cynthia Miller

Manager of Menu Development and Test Kitchen

Lucas Miller

Manager of Food Service Purchasing
Avanelle Reed

Business Administrator
Kelley Rose

Cbord Computer Systems Coordinator
Amy Wagner

Meal and Access Card Systems Coordinator
Teresa Banter

Receptionist/Processing Clerk
Susie Burt

Financial Data Coordinator
Robert Cope

Rhds Office Supervisor
Kyle Green

Assistant to Purchasing Manager
Marguerite Mader

Assistant Facilities Manager
William Reed

Test Kitchen Specialist
Jeraldine Richardson

Office Assistant
Christina Skaggs

Stock Clerk
Dannie Campbell

Food Stores Clerk
David Craig

Food Stores Clerk
Danny Gunter

Food Stores Clerk
Gerald Mason

The Atrium Management

General Manager
Rodney Brooks

University Food Court Assistant Manager
Linda Garcia

Sous Chef
Jason Reynolds

University Food Court Supervisor
Barbara Dorton

University Food Court Supervisor
Andrea Stuffel

University Food Court Supervisor
Jill Thomas

Bookkeeper/Auditor
Josephine Turner

Cardinal Crossing Management

General Manager of University Banquet and Catering
William Kimes

Cardinal Crossing Assistant Manager
Tina Swift

Food Service Supervisor
Frances Percy

Elliott Dining Management

Unit Manager
Eileen Jones

Food Service Supervisor
Robin Hatton

Food Service Supervisor
Timothy Skinner

Bookkeeper
Debra Worster

LaFollette Square Management

Unit Manager
Timothy Radtke

Assistant Manager
Michael Chandler

Sous Chef
Aaron Gnap

Food Service Supervisor
Edward Landreth

Food Service Supervisor
Anna Arison

Food Service Supervisor
Angela Canarecci

Food Service Supervisor/Management Trainee
Megan Luyet

Bookkeeper
Teena Kennedy

Noyer Centre Management

Unit Manager
Polly Ems

Assistant Manager
Amy Hardesty

Sous Chef
Charles Kain

Sous Chef
Allen White

Food Service Supervisor/Management Trainee
Amanda Ahlschwede

Food Service Supervisor
Carol Pettiford

Food Service Supervisor
Jill Schneider

Food Service Supervisor
Kanda Winfield

Bookkeeper
Debra Worster

University Banquet and Catering

General Manager of University Banquet and Catering
William Kimes

Banquet and Catering Chef/Supervisor
Shannon Fultz

Catering Specialist
Saundra Davis

University Banquet and Catering Sales and Service Supervisor
Lisa Fordyce

Banquet and Catering Sales and Service Supervisor
Ana Lisa Padron

Banquet and Catering Secretary
Teresa Rector

Catering Account Representative
Pamela Poti

Woodworth Commons

Woodworth Unit Manager
Amy Grasso

Assistant Manager
Kelly Gnap

Sous Chef
Jonathan Crain

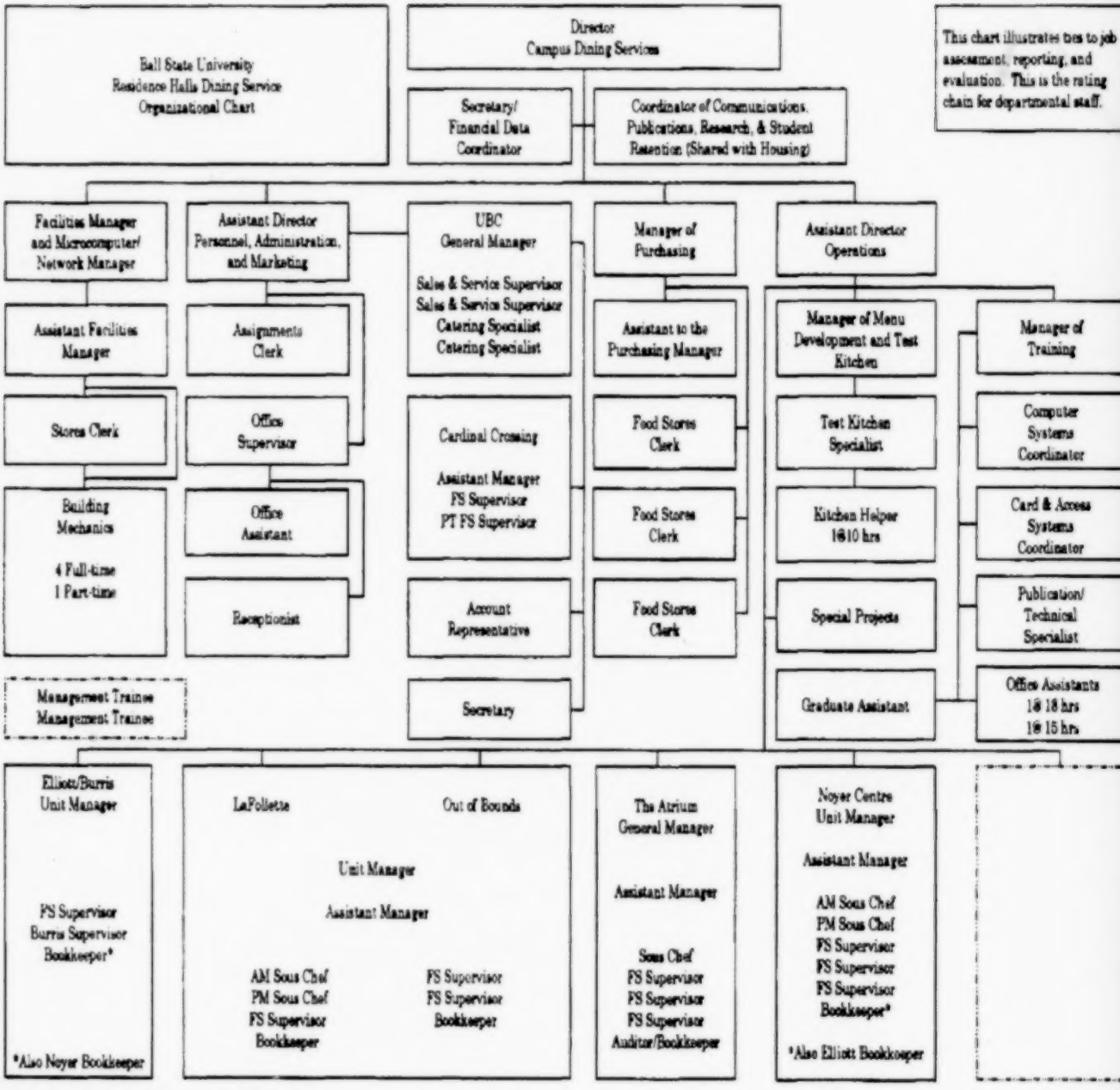
Sous Chef
Cameron Griggs

Food Service Supervisor
Rexanne Arison

Bookkeeper
Phyllis Kennett

BALL STATE UNIVERSITY
RESIDENCE HALLS DINING SERVICE
ORGANIZATIONAL CHART
Dkt. No. 56-1

BALL STATE UNIVERSITY
RESIDENCE HALLS DINING SERVICE
ORGANIZATIONAL CHART
Dkt. No. 56-1



Organizational Chart – Rating Chain – 071106 Revised

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
AUG 29 2012
OFFICE OF THE CLERK

No. 11-556

In the Supreme Court of the United States

MAETTA VANCE,

Petitioner,

v.

BALL STATE UNIVERSITY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

In *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), this Court held that under Title VII, an employer is vicariously liable for severe or pervasive workplace harassment by a supervisor of the victim. If the harasser was the victim's co-employee, however, under the prevailing rule, the employer is not liable absent proof of negligence. In the decision below, the Seventh Circuit held that actionable harassment by a person who was held out as a supervisor and who had the authority to direct and oversee the victim's daily work could not give rise to vicarious liability because the harasser did not also have the power to take formal employment actions against her. The question presented is:

Whether, as the Second, Fourth, and Ninth Circuits have held, the *Faragher* and *Ellerth* "supervisor" liability rule (i) applies to harassment by those whom the employer vests with authority to direct and oversee their victim's daily work, or, as the First, Seventh, and Eighth Circuits have held (ii) is limited to those harassers who have the power to "hire, fire, demote, promote, transfer, or discipline" their victim.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Seventh Circuit, Pet. App. 1a-24a, is reported at 646 F.3d 461. The district court's unreported memorandum and order granting the respondent's motion for summary judgment, Pet. App. 25a-80a, is available at 2008 WL 4247836.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 2011. On August 16, Justice Kagan granted an extension of time to file a petition for a writ of certiorari until October 31 and the petition was filed on that date. This Court granted the petition on June 25, 2012. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964 provides in pertinent part:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

42 U.S.C. § 2000e-2(a).

The Equal Employment Opportunity Commission ("EEOC") guidelines provide in pertinent part:

> An individual qualifies as an employee's "supervisor" if:
>
> a. the individual has authority to undertake or recommend tangible employment decisions affecting the employee; or
>
> b. the individual has authority to direct the employee's daily work activities.

Equal Emp't Opportunity Comm'n, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (1999), 1999 WL 33305874, at *3, Pet. App. 90a (EEOC Guidance).

STATEMENT

In *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), this Court held that Title VII imposes vicarious liability (subject to an affirmative defense) on employers for sex- (and race-)based workplace harassment of a subordinate employee by his or her supervisor. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. In the decision below, the Seventh Circuit, following circuit precedent, held that rule inapplicable to actionable harassment by personnel who direct, oversee, evaluate—and "supervise"—their victims, but do not have power to take formal tangible employment action against them. Pet. App. 12a-13a.

A. Legal Background

Title VII prohibits workplace discrimination on the basis of race, color, religion, sex, or national

origin. 42 U.S.C. § 2000e-2(a). In *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57 (1986), this Court first recognized that sex-based harassment in the workplace is actionable under Title VII. *Id.* at 66. The Court explained, "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." *Id.* at 65. In *Harris* v. *Forklift Systems, Inc.*, 510 U.S. 17 (1993), and *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), the Court laid out the basic elements of a hostile work environment claim: that (1) the race- or gender-based harassment be "severe or pervasive"; (2) a reasonable person in the plaintiff's position would find the environment either hostile or abusive; and (3) the plaintiff perceived it as such. *Harris*, 510 U.S. at 21-22.

In *Faragher* and *Ellerth*, this Court indicated that three different standards govern employer liability in such cases. When the harasser is a *co-worker*, not a supervisor, of the victim, employer liability turns on the employer's negligence—its "combined knowledge [of the behavior] and inaction" in response. *Faragher*, 524 U.S. at 789; see also *Ellerth*, 524 U.S. at 760. When a "*supervisor* with immediate (or successively higher) authority over the [victim]" creates an "actionable hostile environment," on the other hand, vicarious liability applies to the employer. *Faragher*, 524 U.S. at 807 (emphasis added); *Ellerth*, 524 U.S. at 765 (emphasis added). When the supervisor took no tangible employment actions against the victim, however, the employer can raise an affirmative defense "compris[ing] two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee

unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer." *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

In *Parkins* v. *Civil Constructors of Illinois, Inc.*, 163 F.3d 1027 (7th Cir. 1998), the Seventh Circuit took a narrow view of who counts as a "supervisor." It held that vicarious liability applies only when the supervisor has the power to alter the victim's formal employment status, *i.e.*, to hire, fire, promote, or discipline her. *Id.* at 1034 ("[A]bsent an entrustment of at least some of this authority, an employee does not qualify as a supervisor for purposes imputing liability to the employer."). "[F]or purposes of Title VII," an individual who has the title of manager, functions as the victim's boss, oversees her work, and assigns her daily tasks is a mere "co-worker." *Id.* at 1033. As the Seventh Circuit later explained, "'[s]upervisor' is a legal term of art for Title VII purposes," *Rhodes* v. *Illinois Dept. of Transp.*, 359 F.3d 498, 506 (7th Cir. 2004), and, in particular, "a 'supervisor' for purposes of Title VII is not simply a person who possesses authority to oversee the plaintiff's job performance," *Andonissamy* v. *Hewlett-Packard Co.*, 547 F.3d 841, 848 (7th Cir. 2008).

A few months later, the EEOC issued an *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, *available at* 1999 WL 33305874 (reproduced at Pet. App. 81a-93a) (EEOC Guidance), which rejected the Seventh Circuit's interpretation. Under the EEOC Guidance, an employee who has "authority to direct the [victim's] daily work activities" or the power "to recommend," though not personally effect, "tangible

employment decisions" against the victim counts as the victim's "supervisor," Pet. App. 90a, because the employee's ability to harass "is enhanced by his or her authority to increase the employee's workload or assign undesirable tasks," Pet. App. 91a.

That interpretation, which has been advanced by the EEOC as enforcer and as amicus curiae, has persuaded the Second and Fourth Circuits. *Whitten* v. *Fred's, Inc.*, 601 F.3d 231, 245 (4th Cir. 2010) (rejecting, in state law claim decided under federal Title VII principles, rule that absence of "authority to take tangible employment actions" forecloses vicarious liability); *Mack* v. *Otis Elevator Corp.*, 326 F.3d 116, 125 (2d. Cir. 2003); see also *McGinest* v. *GTE Serv. Corp.*, 360 F.3d 1103, 1119 n.13 (9th Cir. 2004) (holding that application of vicarious liability depends "upon whether a supervisor has the authority to demand [his target's] obedience"), cert. denied, 552 U.S. 1180 (2008).

B. Facts and Proceedings Below[1]

This case arises from a decision of the Seventh Circuit holding, as a matter of law, that the respondent employer, Ball State University (BSU), could not be liable for the racial harassment and intimidation to which petitioner, Maetta Vance, was subjected in her workplace.

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[1] Because this case was decided on motions for summary judgment, the courts below were required (as this Court would be) to "draw all reasonable inferences in favor of the nonmoving party," *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); to disregard any evidence supporting Ball State that the jury would not be required to credit; and to refrain from "mak[ing] credibility determinations or weigh[ing] the evidence." *Ibid.*

Ms. Vance began working for BSU in 1989 as a substitute server in the Banquet and Catering Department of the University Dining Services. Pet. App. 2a. She became a part-time Catering Assistant in 1991 and was promoted to full-time Catering Assistant in 2007. *Ibid.* For much of this time, Vance was the sole African-American employee in the division. *Id.* at 1a-2a.

In 2005, Saundra Davis, a Catering Specialist was given authority to direct Vance's and other employees' work. During a previous stint in the department, Davis had physically assaulted Vance, who had reported it to her supervisor at the time, but did not pursue a formal complaint when Davis was transferred out. Pet. App. 3a.

Davis and Connie McVicker, another white employee, created an environment of physical intimidation and racial harassment. Davis threatened Vance, cornering her on an elevator and telling her, "I'll do it again." Pet. App. 3a. She used epithets like "Buckwheat" and "Sambo" to refer to Vance and felt comfortable doing so in the presence of Vance and other employees. *Id.* at 6a. For her part, McVicker regularly used the term "nigger" to refer to both Vance and African-American students at the university and openly boasted of her family's connections to the Ku Klux Klan. *Id.* at 3a. Both Davis and McVicker stared menacingly at Vance, leaving her afraid to be alone with them in the kitchen. *Id.* at 37a n.8.

As this behavior persisted, Vance lived and worked in a constant state of fear. She sought psychiatric care for anxiety and sleeplessness. J.A. 41. The University's incident reports described

Vance as "sitting on the edge of her seat" and "shaking violently" as she recounted the abuse. *Id.* at 34-35.

When Vance reported particular instances of the harassment to the University's Compliance Office, that office repeatedly assigned Bill Kimes, the general manager of Vance's department, to investigate. Kimes had himself long mistreated Vance. The first time she had introduced herself to him, Kimes had refused to shake her hand. Pet. App. 3a. Kimes also regularly excluded Vance from workplace activities, waiting until she left to invite her white coworkers to lunch. *Ibid.* Indeed, respondents conceded that Kimes was abusive, telling the Seventh Circuit that he was "very, very rude" and "ruled by intimidation." Resp. C.A. Br. 6. They denied only that he singled out Ms. Vance for particularly harsh treatment. *Ibid.*[2]

Little was done as the result of Kimes's investigations. Kimes never disciplined Davis (who denied Vance's account of the elevator incident) and instead exhorted both Davis and Vance to "respect" each other in the workplace. Pet. App. 6a. After numerous white employees corroborated Vance's reports about McVicker's racist tirades, BSU issued McVicker, whom it concluded had misled investigators, a confidential letter of reprimand. *Id.* at 16a. Because BSU had no formal policy concerning

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[2] Petitioner presented evidence—sworn statements of fellow employees—that Kimes's abuse of Vance was in fact worse than his mistreatment of the nonminority employees the University identified. See J.A. 413 ("I regularly witnessed Bill Kimes screaming at Maetta Vance, and I never witnessed him talking to her in a normal tone of voice.").

racial harassment—unlike a lengthy and detailed "zero tolerance policy" addressing sex-based harassment, J.A. 438-445, which identified "[p]ossible sanctions * * * as includ[ing] but * * * not limited to * * *: an apology to the victim[,] loss of salary or benefit[,] demotion, suspension, probation, termination, dismissal or expulsion," *id.* at 444, McVicker's letter referenced a generic rule prohibiting "conduct * * * inconsistent with proper behavior," *id.* at 63. In contrast to the University's forceful responses to incidents of gender- and sexual-orientation harassment, *id.* at 18-20 (terminating employee for expressing homophobic attitudes), the University refused Vance's request that McVicker be assigned to another department and even continued to schedule them to work together although it later explained that Kimes had "tried" to avoid doing so, Pet. App. 36a.

Although the reprimand letter indicated that McVicker risked more serious sanctions if she continued to direct racist epithets at Vance, she called Vance a "monkey" the day the letter was issued. Pet. App. 5a. When Vance reported this to Kimes, he discouraged her from "proceeding further" with a complaint, explaining that a "she said-she said exchange * * * wouldn't result in anything positive." *Id.* at 35a; but see J.A. 252 ("In working with Connie McVicker, I heard Ms. McVicker refer to Meetta Vance as a 'porch monkey.'"). This concern for corroboration did not obtain when Vance was accused. When Davis alleged that Vance had splashed pots and pans in her presence, Kimes issued Vance a warning even though no witnesses corrobrated the story. *Id.* at 8a.

The harassment did not abate. Even after Vance complained to the EEOC and filed this action, Davis approached her, taunted her and said, in a Southern accent "you scared?" Pet. App. 7a. Nor did McVicker relent. She cornered Vance and said, "Payback." *Id.* at 37a. Still later (after motions had been filed), Davis and her daughter accosted Vance on the campus, and the daughter said: "You are a nigger, a fucking nigger. You are trying to get my mother fired. What are you gonna do about it? I'll kick your ass." *Id.* at 44a. When Vance and a co-worker told Kimes about this encounter with Davis and her daughter, he told Vance to "get out of [his] face," *id.* at 45a, and did nothing.

When the University's newspaper posted articles describing Vance's lawsuit on its website, numerous overtly racist and threatening comments appeared. One commenter wrote that Vance should go "back to the east side and sell some crack" and another publicly called for a co-worker in the kitchen to "[b]ait [M]s. [Vance] into a physical altercation, make sure others see her strike you first, then beat that loudmouth down, in self-defense." Pet. App. 46a n.13.

Vance sued, making hostile environment and retaliation claims under Title VII. BSU moved for summary judgment, arguing, among other things, that it could not be held vicariously liable under *Ellerth* and *Faragher* because Davis was not Vance's supervisor. Def. Summ. J. Br. 27. In response, Vance pointed to BSU's formal description of Davis's "Catering Specialist" position, which identified "[k]itchen [a]ssistants and [s]ubstitutes" as two "positions supervised" and defined "leadership of up

to 20 part-time, substitute, and student employees" as part of Davis's "position['s] function." J.A. 12

BSU's internal documents were consistent with this description. They (1) described Vance as upset that Davis was "now in a place to *lead at work and do things to [Vance] and get away with it*," J.A. 50 (emphasis added); (2) noted that "Vance said she is not comfortable with Davis leaving her notes and delegating jobs to her in the kitchen," Ball State Internal Documentation Form, Dkt. No. 59-16, at 2; (3) recorded Kimes as describing "[Davis as] responsible for getting [Vance] the prep list for the day," J.A. at 74; (4) noted that there had been much discussion about Davis's "role as a lead person in the kitchen * * * and ho[w] [Vance] feels [Kimes] has never done anything about [Davis] and how she treats [Vance] during the whole time [Davis] has been working back at UBC," *id.* at 66; and (5) admitted Kimes believed that Davis "*does* * * * give [Vance] prep sheets daily," *ibid.* (emphasis added), and that Kimes himself "report[ed] 'that he knows [Davis] has given direction to [Vance],'" *id.* at 67.

Vance's complaints likewise show that she understood both that Davis was her supervisor and that supervisors and co-workers are different. In her BSU complaint, Vance described Davis and McVicker, respectively, as "kitchen supervisor" and "truck driver." J.A. 45. Her contemporaneous handwritten complaint to the local NAACP chapter explained that "Davis * * * came back *as a supervisor* only to start the intimidation again." *Id.* at 28 (emphasis added). She also described Betty Skinner, a Catering Specialist, like Davis, as "the other supervisor," *id.* at 4, and identified McVicker (and

others) as "co-workers and [other] employees who work in the kitchen," *id.* at 29.

Nor was Vance alone in this understanding. Donn Knox, who for years worked in the same kitchen, testified repeatedly at deposition that, while he didn't know "what [BSU] [calls Davis] now," she was "some type of supervisor[]" and had been brought "back to UBC as a supervisor with Betty Skinner." J.A. 385. And when pressed by BSU's counsel as to what "caused [him] to believe she was a supervisor," Knox answered, "[BSU management] told her that she was—they told us she was a supervisor," naming Kimes, in particular, as one who had so identified her. *Id.* at 386. Kimes's deposition testimony also supports Vance's claim. Asked whether Davis was "part of management," he answered "that's complicated," conceding that she "direct[ed] and l[ed] * * * [a]t times." *Id.* at 367. Pressed by Vance's counsel about why he believed Davis did not supervise although she "direct[ed] and lea[d]," Kimes answered that without "authority to discipline" Davis's powers to direct and lead did not make her a "supervisor" under BSU's understanding of the Seventh Circuit rule.[3] *Ibid.*

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[3] BSU's internal documents thus confirm what Vance and other employees consistently maintained: that the Catering Specialists, Davis and Skinner (before she retired), the highest-ranking employees regularly in the kitchen, oversaw its daily operations, with Kimes, the general manager of the department, taking only intermittent supervisory responsibility. See J.A. 78 (noting need "to place a management person in the kitchen at all times so behaviors of employees can be monitored * * * [and that] Betty Skinner, Catering Specialist did oversee employees in the kitchen but she recently retired."); *id.* at 51 (noting that Kimes "reminded [Courtright] that he is also the chef and has a

Rather than denying that Davis oversaw and directed Vance's work, BSU argued that such power was irrelevant under Seventh Circuit law. Defts' Summ. J. Reply Br. 17. Indeed, evidence BSU pointed to in support of summary judgment, an affidavit of BSU's Employee Relations Director attesting that "Saundra Davis is not now, and never has been, a supervisor at Ball State," immediately explained, in language tracking the Seventh Circuit rule, that "*A 'supervisor' at Ball State is a person who has authority to exercise all, or substantially all, of the following powers: to hire, fire, demote, promote, transfer, or discipline an employee. Saundra Davis does not have, nor has she ever had, such authority.*" J.A. 409 (emphasis added).[4]

The district court granted BSU's motion for summary judgment. It first concluded that, whether or not Davis "had authority to direct the work of [Vance and] other employees," Pet. App. 54a, she lacked what the Seventh Circuit centrally required under *Faragher* and *Ellerth*: "the power to hire, fire, demote, promote, transfer, or discipline an employee," *id.* at 53a. The court then held that as a matter of law Vance's claim could not succeed under the

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lot more work to do than just manage employees"); *id.* at 72 (recognizing need for "someone [in the kitchen] who is stronger * * * than the kitchen lead [and] more accessible to the workers").

[4] Gloria Courtright of BSU's Office of [EEO] Compliance, argued along the same lines. She insisted that Vance had erred in identifying Davis as a "supervisor," because "Saundra Davis * * * could not [effect] any of those adverse actions." J.A. __ RE at 26.

negligence standard applicable to co-employee harassment.[5]

The Seventh Circuit affirmed the district court. The court assumed that Vance had carried her burden with respect to three of the four elements of her hostile environment claim: "(1) that [the employee's] work environment was both objectively and subjectively offensive; (2) that the harassment was based on her race; and (3) that the conduct was either severe or pervasive." Pet. App. 11a. It then upheld the district court's holding that Davis was not Vance's supervisor because Davis lacked the "power to directly affect the terms and conditions of [Vance's] employment" by hiring, firing, demoting, promoting, transferring, or disciplining her. *Id.* at 12a (quoting *Rhodes* v. *Ill. Dept. of Transp.*, 359 F.3d 498, 506 (7th Cir. 2004)) (emphasis omitted). Noting that it "ha[d] not joined other circuits in holding that the authority to direct an employee's daily activities establishes supervisory status under Title VII," *id.* at 12a-13a, the Seventh Circuit concluded that Vance's evidence "that Davis had the authority to tell her what to do" failed to raise a triable issue concerning supervisor

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[5] In so holding, the court addressed a dispute between the parties as to whether evidence of post-filing incidents, such as the assault by the Davis family and the comments on the newspaper website, were properly before it. After expressly stating that "even if [the court] were to consider the allegations set forth by Ms. Vance in her supplemental submissions, they would have no effect on our ultimate determination that she is unable to survive summary judgment on her hostile environment claim," Pet. App. 51a, the court agreed with BSU that the submissions should be disregarded for failure to comply with Fed. R. Civ. P. 15(d), the rule governing supplemental pleadings, *id.* at 49a.

status, *id.* at 13a. Vicarious liability thus did not apply to BSU.

As to negligence, the court of appeals upheld the district court, concluding that BSU "promptly investigat[ed] each of [petitioner's] complaints and t[ook] disciplinary action when appropriate." Pet. App. 15a-19a.[6]

Summary of Argument

The Seventh Circuit decision affirming summary judgment rests on that court's distinctive, restrictive—and fundamentally mistaken—view of the Title VII employer liability rules established by *Faragher* and *Ellerth*. Beginning with *Parkins* v. *Civil Constructors of Illinois, Inc.*, 163 F.3d 1027 (7th Cir. 1998), that court's first post-*Faragher*/*Ellerth* decision, the Seventh Circuit (since joined by the Eighth Circuit and others) has developed a rule rooted in the claimed need to distinguish between a "supervisor" in the ordinary sense of the word and "a true supervisor," *id.* at 1033. Holding that "'[s]upervisor' is a legal term of art for Title VII purposes," *Rhodes*, 359 F.3d at 506, the Seventh Circuit has enumerated a narrow set of personnel powers necessary "to make someone a supervisor under Title VII," *Andonissamy* v. *Hewlett-Packard Co.*, 547 F.3d 841, 848 (7th Cir. 2008). Specifically, a

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[6] The court of appeals held that the district court erred in treating petitioner's post-filing evidence as "a disguised Rule 15(d) submission," Pet. App. 9a, emphasizing that a hostile work environment claim is premised on the "cumulative effect of individual acts," *id.* at 10a (quoting *Nat'l R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 115 (2002)), but it declined to remand, noting the district court's discretion to exclude evidence "in the interest of keeping [the case] moving forward," *id.* at 10a-11a.

Title VII plaintiff seeking redress for actionable workplace harassment by a person her employer holds out as her "supervisor" and vests with authority to direct and oversee her daily work activities, to evaluate her performance, or to recommend adverse personnel actions against her is relegated to "co-employee" status unless the harasser "could hire, fire, promote, demote, discipline or transfer" her. *Ibid.*

I. This strange restriction that a person whom the employer, victim, and others in the workplace recognize as the victim's "supervisor" and whose job duties include directing, overseeing, and "supervising" his victim's daily work is not her "supervisor" for purposes of Title VII is nonsensical, arbitrary, and contrary to controlling precedent. Cf. *United States* v. *Bajakajian*, 524 U.S. 321, 346 (1998) (Kennedy, J., dissenting) (highlighting the "doctrinal difficulty" of "speak[ing] of nonpunitive penalties").

A. This Court's decisions conclusively foreclose the Seventh Circuit's restrictive Title VII rule and the premises on which it rests. The particular "supervisory relationship" *Faragher* itself held triggered vicarious employer liability as a matter of law lacked the personnel powers the Seventh Circuit holds necessary. A long line of prior and subsequent Supreme Court precedent refutes the notions (1) that for "purposes of Title VII" "supervisor" is a narrow "term of art," (2) that the most common supervisory powers—to direct a subordinate's daily work, to "demand obedience," *McGinest* v. *GTE Serv. Corp.*, 360 F.3d 1103, 1119 n.13 (9th Cir. 2004), and to evaluate her performance—are peripheral and insufficient to establish a supervisory relationship,

and (3) that only high-level personnel count as "supervisors."

B. Nor do the reasons this Court has given for Title VII's employer liability regime permit the Seventh Circuit's restriction. The primary concerns that led to vicarious employer liability for harassment by supervisors—that such workplace misconduct is aided by the agency relation, which affords supervisors contact with their victims and makes it more difficult for targets to "walk away" from or "blow the whistle" on those who harass them—apply with at least equal force to harassment by an employee's immediate supervisor.

C. The Title VII needs the Seventh Circuit claimed its rule responds to—predictability and certainty of application—do not begin to support the actual rule it imposes. The *Parkins* approach, like other arbitrary and restrictive rules this Court has rejected in a series of recent Title VII cases, purchases the simplicity of a bright line at the cost of undermining the statute and disregarding governing precedent.

But here even the claimed benefits turn out to be chimerical. There is no evidence, in fact, that litigation in jurisdictions rejecting the *Parkins* rule has become voluminous or complex. And unlike other areas of the law, in which the borderline determines the lawfulness of regulated parties' primary conduct, *Ellerth*, *Faragher* and Title VII direct employers to prevent and respond to actionable workplace harassment perpetrated by their agents on both sides of the "supervisor" rule. Indeed, while the Seventh Circuit's short checklist of supervisorial powers may sometimes quickly (though often erroneously) resolve

a harasser's supervisory status, it does not simplify or speed Title VII litigation. Indeed, it does not even speed resolution of the employer responsibility *element* of such claims and instead channels litigation to complex and fact-intensive disputes over negligence.

II. Because the Seventh Circuit applied the wrong legal rule, its judgment against Vance must be reversed. Vance introduced ample evidence that Davis was in fact her supervisor. The district court granted summary judgment, however, because of the Seventh Circuit's restrictive *Parkins* rule and the Seventh Circuit affirmed on that basis. BSU did not argue in either court below that Davis could not be a supervisor under the correct legal standard. As this Court has repeatedly held, once it has determined that a lower court decision is based upon an improper legal rule, it should remand to the lower courts for them to reconsider the case under the correct standard.

Although the Court can resolve the question presented by simply holding that the Seventh Circuit erred in excluding from the *Ellerth/Faragher* rule supervisors who direct and oversee the work of their victims, the Court should provide more precise guidance to lower courts by embracing the Second Circuit's standard. That test, which inquires whether authority granted the harasser "enabled or materially augmented" the harasser's ability to create a hostile work environment for his subordinates, closely resembles the standard crafted by this Court in a similar context in *Burlington Northern* and would provide similar benefits of objectivity, administrability, and tight fit with the core purposes

of Title VII. The Second Circuit's standard properly focuses the inquiry on those practical realities of the workplace that can, as highlighted in *Faragher*, enable harassment, and that standard has proven workable and nondisruptive over many years of application.

ARGUMENT

I. The Seventh Circuit's Restriction On The Vicarious Liability Rule Is Foreclosed By *Ellerth*, *Faragher*, And This Court's Other Decisions

Although the Seventh Circuit and its followers have repeatedly emphasized that "supervisor" is a "term of art" for purposes of Title VII, they have made no effort to square their restriction of its meaning with the holdings and reasoning of this Court's Title VII decisions. Nor could they. This Court has, in fact, ruled out each of the stated but unexplained premises of the Seventh Circuit's rule: (1) that there is a valid and important need to limit Title VII vicarious liability under *Faragher* to some subset of high-level supervisors; (2) that vicarious liability should not apply to actionable harassment by those who are "referred to colloquially," even by the employer itself, as their victim's "supervisor" and charged with overseeing and directing her daily work activities or evaluating her job performance; and (3) that vicarious liability applies only to harassment by those vested with a specific list of personnel powers.

A. "Supervisor" Is Not A Narrow "Term of Art" For Purposes of Title VII

1. While *Faragher* and *Ellerth* recognize reasons for not extending vicarious liability to the abusive workplace conduct of "co-employees," they nowhere suggest that harassment by those held out by the employer and understood to be the victim's "'supervisor' in the colloquial sense of the word," *Andonissamy* v. *Hewlitt-Packard Co.*, 547 F.3d 841, 848 (7th Cir. 2008), should be exempted or that personnel powers in addition to "*supervising*" the subordinate employee are required to "make [the harasser] a supervisor for purposes of Title VII," *ibid.*; see also *EEOC* v. *Ceisel Masonry, Inc.*, 594 F. Supp. 2d 1018, 1025 (N.D. Ill. 2009) ("The bulk of [the harasser's] job duties consisted of supervising the work of [those he abused.] * * * [He] did not have the authority to hire, fire, demote, promote or transfer employees. Nor does [his] ability merely to *recommend* discharge transform him into a supervisor, even if his recommendations usually were followed.").

To the contrary, *Faragher* recognized the dangers of harassment by front-line supervisors, *i.e.*, those with power to "control[] and supervis[e] all aspects of [their target's] day-to-day activities," *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 808 (1998) (quoting *Burlington Indus.* v. *Ellerth*, 524 U.S. 742, 761 (1998), and the need to hold employers responsible for it, *id.* at 801-808. In fact, the Seventh Circuit's restriction fails the first and most basic test: consistency with the *holding* of the decision it is meant to implement. One of the two "supervisors," *id.* at 808, to whom the Court in *Faragher* applied the

vicarious liability rule, Marine Safety lieutenant (later captain) David Silverman, did not possess any of the personnel powers the Seventh Circuit rule has held indispensable, *id.* at 810. Rather, Silverman was "responsible for making [the plaintiff and other lifeguards'] daily assignments, and for supervising their work and fitness training." *Id.* at 781.

The particular employer-conferred authority Silverman threatened to abuse, his power to assign the plaintiff undesirable tasks, like "clean[ing] the toilets for a year," unless she agreed to "[d]ate [him]," *Faragher*, 524 U.S. at 780, appears nowhere on the Seventh Circuit's enumerated list of "true supervisor" powers, *Parkins* v. *Civil Constructors of Ill., Inc.*, 163 F.3d 1027, 1033 (7th Cir. 1998). Indeed, those courts adopting the Seventh Circuit's rule have held, as a matter of law, that such power over the victim's work life does not make a harasser a supervisor for purposes of the *Faragher* and *Ellerth* liability regime. See, *e.g.*, *Weyers* v. *Lear Operations Corp.*, 359 F.3d 1049, 1057 (8th Cir. 2004) (holding that the harasser was not a supervisor "[a]lthough [the harasser] had the authority * * * to assign [the plaintiff] to particular tasks"); cf. *Browne* v. *Signal Mountain Nursery, L.P.*, 286 F. Supp. 2d 904, 914 (E.D. Tenn. 2003) (professing confusion as to "how the authority to assign unpleasant work activities, as opposed to desirable ones, operates to enhance a supervisory employee's capacity to sexually harass subordinate"). The principal power this Court cited for characterizing Bill Terry, the other harasser in *Faragher*, as a "supervisor" was the power "to hire new lifeguards *(subject to the approval of higher management).*" 524 U.S. at 781 (emphasis added). This power too falls on the wrong side of the Seventh

Circuit's line. See *Weyers* 359 F.3d at 1057 (holding that a harasser whose evaluations led to his victim's firing was a co-worker because "[he] himself did not have the authority to take tangible employment action against [the plaintiff]"); accord *Ceisel Masonry*, 594 F. Supp. 2d at 1025 (holding that harassers are not supervisors when "ultimate [decisions] * * * are entrusted to a higher level manager"). This Court's careful formulation of the vicarious liability rule as applicable to "an actionable hostile environment created by a supervisor with *immediate* (or successivey higher) authority over the [victim]," *Faragher*, 524 U.S. at 807 (emphasis added); *Ellerth*, 524 U.S. at 765 (emphasis added), refutes the Seventh Circuit's premise that harassment by high-level management is the rule's primary or sole concern.

2. *Faragher* and *Ellerth did* identify a subset of high-ranking supervisors whose actions should be subject to a distinct Title VII liability rule. A "supervisor," the Court recognized, may "hold a sufficiently high position 'in the management hierarchy of the company'" that under ordinary agency principles "his actions [should] be imputed automatically to the employer." *Faragher*, 524 U.S. at 789-790 (quoting *Torres* v. *Pisano*, 116 F.3d 625, 634-635 & n.11 (2d Cir. 1997)). In these cases, the employer is directly, not vicariously, liable on the theory that these high-level managers are the employer's "proxy," *id.* at 789, or "alter ego," *Ellerth*, 524 U.S. at 758 (citing Restatement (Second) of Agency § 219(2)(a) (1957)).

Tellingly, the Seventh Circuit used this entirely distinct line of authority, addressing the "class of an

employer['s] * * * officials who may be treated as [its] organization's proxy," *Faragher*, 524 U.S. at 789, to derive the particular "essential attributes of a *supervisor* for purposes of a claim of hostile environment sexual harassment under Title VII," *Parkins*, 163 F.3d at 1033 & n.1. Thus *Parkins* cited *Sauers* v. *Salt Lake County*, 1 F.3d 1122 (10th Cir. 1993), which explained that an "'individual * * * [who] serves in a supervisory position and exercises significant control over the plaintiff's hiring, firing or conditions of employment' * * * operates as the alter ego of the employer," *id.* at 1125 (quoting *Paroline* v. *Unisys Corp.*, 879 F.2d 100, 104 (4th Cir. 1989), aff'd in pertinent part, 900 F.2d 27 (1990) (en banc)), and reasoned that since, "as county attorney, [the harasser] had the ultimate authority over [plaintiff's] employment and working conditions[,] * * * plaintiff's claim of a hostile work environment caused by [his] conduct is a claim *against Salt Lake County itself*," *ibid.* (emphasis added). *Parkins* also cited two other cases, *Pierce* v. *Commonwealth Life Insurance Co.*, 40 F.3d 796, 803 (6th Cir. 1994), and *Haynes* v. *Williams*, 88 F.3d 898, 899 (10th Cir. 1996), that rest on the "alter ego" theory of direct employer liability.[7]

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[7] Another case relied on by *Parkins*, *Yates* v. *Avco Corp.*, 819 F.2d 630, 636 (6th Cir. 1987), addressed a distinct, but related issue: whether an individual ranks so high within a firm that his personal knowledge (that unlawful conduct is ongoing) should be imputed to the employer, thereby placing the employer itself "on notice." In such cases, courts have long concluded, consistently with agency law principles, only a subset of "supervisors"—those at the "management level"—qualify. As the Third Circuit recently explained:

> [W]e require that this knowledge have reached an employee in the governing body of the entity, as opposed

3. Nor was *Faragher* an outlier in its understanding of who counts as a supervisor "for purposes of Title VII." This Court has had no trouble identifying what it means to be a supervisor and has never searched for powers beyond "supervising the work" of a subordinate, *Ceisel Masonry, Inc.*, 594 F. Supp. 2d at 1025, to "transform," *ibid.*, someone into the subordinate's "true supervisor." Rather, this Court has repeatedly held consistent with ordinary usage, see, e.g., *United States* v. *Stratton*, 779 F.2d 820, 827 (2d Cir. 1985) ("In ordinary parlance, a relationship of supervision is created when one person gives orders or directions to another person who carries them out."), that someone who directs and oversees another's work is her supervisor.

In *Pennsylvania State Police* v. *Suders*, 542 U.S. 129 (2004), for example, this Court addressed "whether a constructive discharge brought about by supervisor harassment * * * precludes assertion of

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> to merely a supervisory employee in the labor force. * * * [M]ere supervisory authority over the performance of work assignments by other co-workers is not, by itself, sufficient to qualify an employee for management level status. * * * [T]o the extent that such a supervisor does not have a mandate generally to regulate the workplace environment, that supervisor does not qualify as management level.

Huston v. *Procter & Gamble Paper Prods. Corp.*, 568 F.3d 100, 108 (3d Cir. 2009); accord *Swinton* v. *Potomac Corp.*, 270 F.3d 794, 804-805 (9th Cir. 2001) (emphasizing differences between personnel whose managerial powers make imputation appropriate and those whose powers over the employee warrant vicarious liability under *Faragher*); cf. *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 286 (1974) (discussing NLRA's distinct exemptions for "managers" and "supervisors").

the affirmative defense articulated in *Ellerth* and *Faragher*." *Id.* at 140. The "three *supervisors*" found to have subjected the plaintiff to workplace abuse, *id.* at 134 (emphasis added), were a sergeant, whom the employer described as "formally the direct supervisor of respondent and [of] the other communications operators," and two corporals, who, it said, "supervised [operators] on a day-to-day basis [depending on] * * * the[] shift," Pet. Br. at 3, *Suders*, *supra* (No. 03-95). Although the Court reversed the court of appeals decision holding the employer liable and remanded to allow the employer to assert *Faragher* and *Ellerth*'s affirmative defense, it nowhere suggested that the employer's vicarious liability depended on these individuals possessing any of the powers on the Seventh Circuit's list.

In *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), decided the same Term as *Faragher* and *Ellerth*, the Court similarly described two members of plaintiff's "eight-man [oil rig] crew" who had abused him, "Lyons, the crane operator, and Pippen, the driller," as having "*supervisory authority*," *id.* at 77 (emphasis added), based on plaintiff's representation that they "had *de facto* control over the conditions of his employment," Pet. Br. at 5, *Oncale*, *supra* (No. 96-568); but see Resp. Br. at 1, *Oncale*, *supra* (No. 96-568) (noting that "driller" had no authority over "roustabouts" like the plaintiff).

Likewise, in *Burlington Northern & Santa Fe Railway Co.* v. *White*, 548 U.S. 53 (2006), nothing suggests that Bill Joiner, the person who initially harassed the plaintiff, and Percy Sharkey, the person who falsely accused her of being insubordinate after

she complained to the EEOC, an action that led *his* supervisor to suspend the plaintiff without pay, had any of the powers the Seventh Circuit test requires. The Sixth Circuit, in fact, had characterized Joiner as "her foreman," *White* v. *Burlington N. & Santa Fe Ry. Co.*, 310 F.3d 443, 447 (6th Cir. 2002) (vacated panel opinion), and described her as "working under the supervision of * * * foreman Percy Sharkey" on the day he reported her, 364 F.3d 789, 793 (6th Cir. 2004) (en banc). This Court described both Joiner and Sharkey, however, as the plaintiff's "immediate supervisor[s]." 548 U.S. at 58.

In *Staub* v. *Proctor Hospital*, 131 S. Ct. 1186 (2011), a case arising under an employment discrimination statute "very similar to Title VII," *id.* at 1191, this Court characterized as a "supervisor," *id.* at 1189, someone who had not made and "was not charged with making [an] ultimate employment decision," *id.* at 1190, but had given a biased evaluation which she intended to lead to the plaintiff's termination. *Staub* described the lower court's rule that only the motives of those employees who make "ultimate employment decision[s]," *ibid.*, could give rise to employer liability as "implausible" because it would shield an employer "from [liability for] discriminatory acts and *recommendations of supervisors* that were designed * * * to produce [an] adverse action." *Id.* at 1193 (emphasis added).

These decisions are consistent with the definitions of "supervisor" and related terms commonly found in dictionaries. See *Webster's New International Dictionary* 2533 (2d ed. 1960) (defining "supervise" in second definition as "[t]o oversee for direction; to superintend"); *Webster's New World Dictionary* 1430

(2d college ed. 1980) (defining "supervise" as "to oversee or direct (work, workers, a project, etc.); superintend"); *New Oxford American Dictionary* 1698 (2d ed. 2005) (defining "supervise" as to "observe and direct the work of (someone): nurses were supervised by a consulting psychiatrist.");[8] *Oxford English Dictionary* (3rd ed. online June 2012), http://www.oed.com/view/Entry/194560 (defining "supervisor" in first definition as "a person who directs or oversees a task or activity and in third definition as "[a] person who oversees the work or conduct of another or others"). And this Court itself, in cases extending across a broad range of subject matters, commonly uses the term in this ordinary way. See, e.g., *Messerschmidt* v. *Millender*, 132 S. Ct. 1235, 1243 (2012) ("The police officer] submitted the warrants to his supervisors—Sergeant Lawrence and Lieutenant Ornales—for review."); *Bullcoming* v. *New Mexico*, 131 S. Ct. 2705, 2722 (2011) ("It would be a different case if, for example, a supervisor who observed an analyst * * * testified."); *Sheridan* v. *United States*, 487 U.S. 392, 407 (1988) (noting danger that litigants could circumvent the FTCA

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[8] Notably, under the Seventh Circuit's rule, doctors who are given (and unlawfully abuse) authority to direct nurses' work activities are their victims' "co-workers," because they lack power to take personnel actions against the nurses whose activities they control and direct. See *Kirkland* v. *State Univ. of Iowa*, No. 3-99-CV-30105, 2001 WL 737548, at *6 (S.D. Iowa May 1, 2001) (finding that the fact that doctor had "the ability to persuasively recommend to her supervisors that [an "EKG extern"] be fired or disciplined [and had] * * * threatened to report a mistake she had committed unless she submitted to his sexual advances" was "beside the point" because he "had no supervisory authority to make [firing and discipline] decisions").

intentional tort exclusion by "ascrib[ing injuries] to the negligence of the tortfeasor's supervisors").

4. "Supervisor" also has an assigned meaning under the National Labor Relations Act, one that casts further doubt on the Seventh Circuit's restriction. That law's definition of "supervisor[y]" employees includes not only personnel with power "to hire, * * * promote, discharge, * * * or discipline," but also those with "responsib[ilit]y to direct" other employees or with authority "effectively to recommend [personnel] actions," 29 U.S.C. § 152(11), the two types of authority the Seventh Circuit repeatedly has said are not "actual supervisory powers," *Parkins*, 163 F.3d at 1033; see *Iowa Elec. Light & Power Co.* v. *NLRB*, 717 F.2d 433, 434-435 (8th Cir. 1983) (explaining that "[a]uthority to do only one of these listed acts is enough to make an employee a supervisor").

Indeed, the rules this Court forcefully rejected in its recent cases addressing that provision, *NLRB* v. *Health Care & Ret. Corp. of Am.*, 511 U.S. 571 (1994) (*HCRCA*), and *NLRB* v. *Kentucky River Cmty. Care, Inc.*, 532 U.S. 706 (2001), rested on premises strikingly similar to the Seventh Circuit's. In *HCRCA*, the NLRB maintained that the licensed practical nurses whose status was disputed were "supervisors [only] when, '*in addition to* performing their professional duties and responsibilities, they also possess the authority to affect the job status or pay of [nurses' aides] working under them." 511 U.S. at 578 (quoting Reply Br. at 4, *HCRCA*, *supra* (No. 92-1964)) (emphasis added). The NLRB argued, in other words, that "a nurse who * * * engage[s] in responsible direction of other employees is not a

supervisor. Only a nurse who * * * engage[s] in one of the activities related to another employee's job status or pay can qualify." *Id.* at 579. The *HCRCA* Court answered that it could "perceive" "no plausible justification" for treating "responsible direction" authority as lesser than ones involving hiring and firing. *Ibid.*; accord *Kentucky River*, 532 U.S. at 719 (noting that Congress had forbidden the NLRB from limiting supervisor status to those who "direct the work of other employees *and* perform another listed function" and had provided that "direction alone [would] suffice"). Indeed, "responsib[ility] to direct" had been added to the original NLRA list because, its sponsor explained, without it, Section 152(11)'s definition risked "cover[ing] * * * everything except the basic act of supervising," 93 Cong. Rec. 4677 (1947) (Statement of Sen. Flanders), reprinted in 2 NLRB, *Legislative History of the Labor Management Relations Act, 1947*, at 1303 (1948).

B. The Seventh Circuit's Rule Violates The Reasoning of *Ellerth* and *Faragher* And The Purposes Of Title VII

The Seventh Circuit rule fails a second important test: consistency with the *reasoning* of the decisions and with the purposes of the statute it ostensibly implements. Although the Seventh Circuit rule stands on the premise that "for purposes of Title VII" the term "supervisor" means something narrower than it does "colloquial[ly]" and in other statutes, *Andonissamy* v. *Hewlett-Packard Co.*, 547 F.3d 841 848 (7th Cir. 2008), that premise violates the Title VII concerns *Ellerth* and *Faragher* found justified vicarious liability. The consistent reasoning of this

Court's subsequent Title VII decisions also rules this premise out.

1. In *Ellerth* and *Faragher*, this Court held that (subject to the affirmative defense) employers are liable under Title VII for supervisors' actionable harassment. Grounding its reasoning in the "aided by agency" principle of the Restatement (Second) of Agency § 219 (1957), this Court identified three different ways in which supervisory authority aids harassers: (1) their supervisory authority "affords contact with [the] employee subject[] to [their] harassment," *Faragher*, 524 U.S. at 803; (2) those harassed "generally cannot check a supervisor's abusive conduct the same way that [they] might deal with abuse from a co-worker," *ibid.*; and (3) the "acts of supervisors have greater power to alter the environment than acts of coemployees generally," *id.* at 805. In all these ways, a supervisor's abusive behavior "necessarily draw[s] upon his superior position." *Id.* at 803.

All three of these reasons for adopting vicarious liability are directly implicated when the harasser has the authority to direct his victim's daily work activities, whether or not he also has the authority to make formal employment decisions. First, those who direct others' daily work activities can often arrange or count on contact—often away from others—with those they would harass. Indeed, this is illustrated by the facts of *Ellerth* itself.

In *Ellerth*, the Court cited three incidents of particular concern. In two of them the harassing supervisor had control over the location of the meeting with the subordinate and in one of those he was able to ensure that others were not present.

(Although the harasser had *Parkins* powers over the victim, the Court's analysis did not rest on that fact. It turned instead largely on his non-*Parkins* power to manage and control his victim's presence.) In the first incident, during "a business trip, [the supervisor] invited Ellerth to the hotel lounge, an invitation Ellerth felt compelled to accept because [the supervisor] was her boss." 524 U.S. at 748. At the meeting, after "Ellerth gave no encouragement to remarks [her supervisor] made about her breasts, he told her to 'loosen up' and warned, 'you know, Kim, I could make your life very hard or easy at Burlington.'" *Ibid.* (citations omitted). In the second incident, during a promotion interview, the supervisor "expressed reservations * * * because [Ellerth] was not 'loose enough' [and] reach[ed] over and rub[bed] her knee." *Ibid.* (citation omitted). In both cases, the supervisor used his authority to determine the location and character of the meeting to make sexual overtures that he could not easily make in an ordinary, public work environment. His power to manage his victim's presence—often away from the knowing observance of others—augmented his power to injure and coerce.

A recent Eighth Circuit case well illustrates how control over another employee's physical presence and absence of others from the particular workplace environment can augment one's ability to harass and increase the harassment's severity. In *EEOC* v. *CRST Van Expedited, Inc.*, 679 F.3d 657 (8th Cir. 2012), the Eighth Circuit held that so-called "Lead Drivers" who drove with trainee drivers during their 28-day training trip were not "supervisors" subject to the *Ellerth/Faragher* rule because they did not have "the power (not necessarily exercised) to take tangible

employment action against the victim," *id.* at 684. The Lead Drivers, it found, "could only (1) dictate minor aspects of the trainees' work experience, such as scheduling rest stops during the team drive and (2) issu[e] a non-binding recommendation * * * concerning whether CRST should upgrade the trainee to full-driver status." *Ibid.* The court cited evidence, however, that the Lead Drivers employed these limited authorities to subject trainees to serious harassment. One plaintiff, Jones,

> testified that, on three or four occasions over the course of a two-week training trip, her Lead Driver, James Simmons, entered the cab wearing only his underwear and rubbed the back of her head, despite repeated requests by Jones that he stop. Jones also testified that, "everyday," Simmons entered the cab in his underwear while she was driving. Additionally, according to Jones, Simmons called her "his bitch" five or six times, including on one occasion when, in response to Jones's complaints about his slovenly habits, he ordered Jones to clean up the truck, declaring "that's what you're on the truck for, you're my bitch. I ain't your bitch. Shut up and clean it up." Finally, Jones testified that, like many of CRST's Lead Drivers, Simmons routinely urinated in plastic bottles and ziplock bags while in transit. However, Jones testified that Simmons would leave his urine receptacles about the truck's cab and that when Jones implored Simmons to gather them, Simmons ordered her to "shut up and clean it up."

Id. at 688. Other testimony indicated that another employee used the power to direct rest stops to

devastating effect. In addition to asking his female co-driver to "drive naked" and "grabb[ing her] face while she was driving and beg[inning] screaming that 'all he wanted was a girlfriend,'" this employee "refused [his female co-driver's] repeated requests to exit at a truck stop so she could go to the bathroom, ordering her to urinate in a parking lot instead." *Id.* at 687-688. This power to "dictate minor aspects of the * * * work experience," *id.* at 684, enabled the directing employee to make "a patent attempt at humiliation," *id.* at 688.

Immediate supervisors who direct their targets' daily work are, in fact, typically aided by their agency relationship more powerfully than are higher-level managers who have the sort of personnel powers *Parkins* and its progeny insist upon.[9] Indeed, immediate supervisors typically are "afforded" far more "contact" with those whom they subject to workplace abuse than are successively higher supervisors. As the decided cases illustrate, the employer-conferred power to direct a subordinate where to be and what to do on a daily basis can enable especially grave forms of workplace abuse. See *Whitten* v. *Fred's, Inc.*, 601 F.3d 231, 236 (4th Cir. 2010) (store manager used his authority to order the plaintiff into a storeroom, where he could sexually assault her).

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[9] Of course, as *Faragher* noted, instances of harassment by very high-ranking company actors are not unknown. See 524 U.S. at 789 (noting that harasser in *Harris* "was the president of the corporate employer") (citing *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 19 (1993)); see also *Crawford* v. *Metro. Gov't*, 555 U.S. 271, 273 (2009) (harasser was defendant's "employee relations director"); *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989).

Second, victims of harassment "generally cannot check a [directing employee's] abusive conduct the same way that [they] might deal with abuse from a co-worker." *Faragher*, 524 U.S. at 803. In *Faragher*, this Court expressly noted in reaching its decision that "[w]hen a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor." *Ibid.* It further held Boca Raton vicariously liable for one employee's (Silverman's) harassment because, although he had no authority to take tangible employment actions, he was "responsible for making the lifeguards' daily assignments[] and supervising their work and fitness training." *Id.* at 781. As the Court noted, this power to set daily work assignments gave Silverman the ability to retaliate against his victims, as illustrated by his proposition to the plaintiff: "Date me or clean toilets for a year." *Id.* at 780.

Similarly, in *CRST*, testimony indicated that the threat of retaliation by Lead Trainers gave them power to harass trainees even though they had no power to take tangible employment actions against them. One testified that her Lead Trainer

> began to make sexual remarks to me whenever he gave me instructions. He told me that the gear stick is not the penis of my husband, I don't have to touch the gear stick so often. 'You got big tits for your size, etc. . [.]' I informed [him] that I was not interested in a sexual relationship with him. [Over a period of two weeks, he] forced me to have unwanted sex with him on several occasions while we were traveling in order [for me] to get a [recommendatory] passing grade.

679 F.3d at 666.

Third, those who direct the activities of others necessarily "have greater power to alter the environment than acts of coemployees generally." *Faragher*, 524 U.S. at 805. Unlike co-employees, those who oversee and direct can punish those who resist, more effectively enlist others to their ends, and more directly set the tone and values of an organization. Because they lead others, their actions send a strong signal of appropriate organizational behavior and have more power to shape other employees' views and actions. Those who oversee and direct, like those who hire, fire, and set pay, also have a greater ability to pressure and deter witnesses, who can report on their misbehavior.

2. Even if *Ellerth* and *Faragher* did not themselves refute it, this Court's later decisions in *Burlington Northern* and *Staub* certainly foreclose the notion that only those supervisors with *Parkins* powers can use their supervisory relationship to intimidate and injure their victims. In *Burlington Northern*, the Court relied on "common sense" to hold that Title VII's retaliation clause, 42 U.S.C. § 2000e-3(a), prohibited "discrimination" beyond "adverse employment action[s]," 548 U.S. 53, 64 (2006). It made actionable, in other words, not just retaliation in "hiring, granting leave, discharging, promoting, and compensating," *id.* at 60 (quoting *Mattern* v. *Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997)), but more generally through any action that "might well have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 68 (quoting *Rochon* v. *Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)). The Court recognized that

"[a]lmost every job category involves some responsibilities and duties that are less desirable than others" and that "one good way to discourage an employee * * * from bringing discrimination charges would be to insist that she spend more time performing the more arduous duties and less time performing those that are * * * more agreeable." *Id.* at 70-71. Limiting actionable retaliation to tangible employment actions, the Court explained, would fail to "deter [this and] the many [other] forms that effective retaliation can take." *Id.* at 64.

Similarly, *Whitten* v. *Fred's, Inc.*, 601 F.3d 231, illustrates how a supervisor who does not have the power to take tangible employment actions against his victim can nonetheless use his other powers over her to facilitate harassment. There the harasser "told [his supervised victim] that if she wanted long weekends off from work, she needed to 'be good to [him] and give [him] what [he] want[ed' and that] he would make her life a 'living hell' if she ever took work matters 'over [his] head.'" *Id.* at 236. He then carried out his threats by "order[ing] her to stay late to clean the store [even] if it took her all night" and later ordering her to work on Superbowl Sunday, a day she had scheduled off. *Ibid.*

The *Parkins* rule, by contrast, treats a harassing supervisor who has employer-conferred authority to take (and threaten) many kinds of "effective retaliation," indeed the very power to assign undesirable tasks that this Court highlighted in *Burlington Northern*, as a "mere co-worker." Thus, in *CRST*, one harasser whom the *Parkins* rule did not count as a supervisor "ordered [a trainee truck driver plaintiff] to clean up the truck," including discarding

plastic bottles and ziplock bags containing the harassers' urine. 679 F.3d at 688. He told her "that's what you're on the truck for, you're my bitch. I ain't your bitch. Shut up and clean it up." *Ibid.* Lower courts applying the *Parkins* rule fail to understand how powers other than taking tangible employment actions can enable harassment. See *Browne* v. *Signal Mountain Nursery, L.P.*, 286 F. Supp. 2d 904, 914 (E.D. Tenn. 2003) (defending *Parkins* rule and professing confusion as to "how the authority to assign unpleasant work activities, as opposed to desirable ones, operates to enhance a supervisory employee's capacity to sexually harass subordinates").

Staub also forecloses the *Parkins* rule. It characterized as "supervisors" agents who could not "*directly* affect" their victim's employment in the ways the Seventh Circuit demands, see p. 25, *supra*, and further recognized that such personnel can nonetheless "cause an adverse employment action," 131 S. Ct. at 1194, by providing the ultimate decision-maker with biased and untruthful "performance assessments" of their subordinates, *id.* at 1192; see *ibid.* (highlighting the "implausib[ility]" of shielding "employer from [liability for] discriminatory * * * *recommendations of supervisors* that were designed and intended to produce [an] adverse action") (emphasis added and original emphasis omitted). But the Seventh and Eighth Circuits have repeatedly rejected exactly this power as insufficient to establish supervisory status. In *CRST*, for example, the latter court held that evidence that a "Lead Trainer[] forced [his subordinate] to have unwanted sex * * * in order to get a passing grade [from him]," 679 F.3d at 666, could not trigger vicarious liability because the

harasser's evaluation, rendered after a twenty-eight-day trip and "virtually always followed," was "non-binding," *id.* at 684; accord *Ceisel Masonry*, 594 F. Supp. 2d at 1025 (harasser's "ability merely to *recommend* discharge" does not "transform him into a supervisor, even if his recommendations usually were followed").

As both *Staub* and *Burlington Northern* make clear, the central concern of the *Ellerth/Faragher* rule, protecting victims reluctant to run the "risk of blowing the whistle," is present whenever a harassing supervisor has power over the subordinate sufficient to "dissuade[] a reasonable worker from making * * * a charge of discrimination." *Burlington Northern*, 548 U.S. at 68. And, as these cases specifically hold, consistently with common sense, many powers beyond taking tangible employment actions, particularly the power to assign job duties, plainly qualify.

3. Considering employees who possess these powers over their victims "supervisors" also promotes the important Title VII purpose of "avoid[ing] harm" on which *Faragher* and *Ellerth* ultimately rest. *Faragher*, 524 U.S. at 806; see also *Ellerth*, 524 U.S. at 764. Both the rule of vicarious liability and the affirmative defense provide employers the incentive to screen supervisors properly, monitor them, and establish effective training and complaint programs. *Faragher*, 524 U.S. at 803; *Ellerth*, 524 U.S. at 764-765. The Seventh Circuit's rule, by contrast, encourages employers to resort to formalities to defeat liability. Thus, in language anticipating this Court's reasoning in *Staub*, one lower court explained:

> [Accepting the Seventh Circuit's rule] would facilitate an employer to effectively insulate itself from the application of *Faragher*, and *Ellerth*, simply by directing all critical personnel decisions to be effected by a personnel department, which may have no direct, and only infrequent contact with the employee subject to the harassment.

Grozdanich v. *Leisure Hills Health Ctr., Inc.*, 25 F. Supp. 2d 953, 973 (D. Minn. 1998); see *Staub*, 131 S. Ct. at 1193 (rejecting rule that would enable employer to be "effectively shielded from [liability for] discriminatory acts and recommendations of supervisors" by vesting ultimate authority for personnel decisions in a different company official); see also 93 Cong. Rec. 4677-4678 (1947) (Statememt of Sen. Flanders) (explaining that "responsibility to direct" should be added to the list of NLRA "supervisor" powers because "[m]any of the [other] activities * * * are transferred in modern practice to a personnel manager or department").

The Seventh Circuit rule obviously disserves another recognized purpose of Title VII, especially as amended in 1991: to provide a remedy for those harmed by unlawful discrimination, see *Burlington Northern*, 548 U.S. at 72; *West* v. *Gibson*, 527 U.S. 212, 217-220 (1999), and for victims of sexual harassment in particular, see H.R. Rep. No. 40 (II), 102d Cong., 1st Sess. 25 (1991). The 1991 amendments not only rejected the holding of *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989), that racial harassment was not actionable under 42 U.S.C. § 1981, see 42 U.S.C. § 1981(b), (c) (as amended); *id.* § 2000e-2(m), but they enacted a Title VII damages remedy, see *id.* § 1981a(a)(1), (b),

responsive to "disturbing" evidence in the legislative record concerning "the severe consequences * * * the lack of [such a remedy]" caused workers "who suffered severe sexual harassment on the job." H.R. Rep. No. 40 (II), at 25. The Seventh Circuit rule, by requiring those unlawfully harassed by supervisors enjoying no *Parkins* powers to make the showing of employer negligence that *Faragher* rejected, ill-serves that purpose.

C. No Valid Reason Supports The Seventh Circuit's Restriction

Courts imposing the *Parkins* restriction have offered little justification—and no valid justification—for doing so. *Parkins* itself argued that the rule was necessary to distinguish "employees who are supervisors merely as a function of nomenclature from those who are entrusted with actual supervisory powers." 163 F.3d at 1033. But no court of appeals applying the more flexible rule has held that "nomenclature" is determinative. See *Whitten*, 601 F.3d at 245-246 (explaining that "[w]hile the parties' titles may not be dispositive, 'the harasser's formal rank vis-à-vis that of the victim in the particular employment hierarchy . . . is of critical and sometimes decisive evidentiary importance'") (quoting *Mikels* v. *City of Durham*, 183 F.3d 323, 331-332 (4th Cir. 1999)). These courts look to the actual working relationship of the employees to determine whether one is a supervisor of the other. In *Whitten*, for example, the Fourth Circuit found that the following facts "point clearly to the conclusion that Green was Whitten's [, the plaintiff's,] supervisor":

> Except for the days when district manager Eunice was present in the store, Green was the highest

> ranking employee in the Belton store, and Green was in fact the highest ranking employee in the store on the two days that Whitten worked there. Moreover, the evidence establishes that Green directed Whitten's activities, giving her a list of tasks he expected her to accomplish; that Green controlled Whitten's schedule; and that Green possessed and actually exercised the authority to discipline Whitten by giving her undesirable assignments and work schedules. Finally, while it is not dispositive, it is worth noting that both Green and Whitten believed that Green was Whitten's supervisor.

Id. at 246 (footnote omitted). The Fourth Circuit's careful analysis eschewed the empty formalism of the *Parkins* test and instead looked to see whether Green "had power and authority that made Whitten vulnerable to his conduct 'in ways that comparable conduct by a mere co-worker would not.'" *Ibid.* (quoting *Mikels*, 183 F.3d at 333). Even though Green possessed no power to take tangible employment actions, the Fourth Circuit held that "Green's authority over Whitten * * * aided his harassment of her and enabled him to create a hostile working environment." *Ibid.*

To be sure, the Seventh Circuit test might be expected by dint of being so formalistic and restrictive to be somewhat more determinate. But even if that were true, which it is not, see pp. 41-42, *infra*, this Court has made clear that rules that purchase simplicity by sacrificing fidelity to governing precedent and statutory purposes cannot be upheld. Cf. *Gen. Motors Corp.* v. *Ruckelshaus*, 742 F.2d 1561, 1572-1573 (D.C. Cir. 1984) (Bazelon, C.J.,

dissenting) (describing rule as "enjoy[ing] the virtues of simplicity [and] administerability" but "suffer[ing] from the vices of * * * marked *in*congruence with the language and history of the statute it purports to interpret").

The Seventh Circuit rule, moreover, actually adds little certainty and predictability to litigation. The most salient difference between the EEOC's Guidance and *Parkins*, for example, is that the former adds two powers to the latter's list of powers that make one a supervisor: the power to direct daily activities and the power to recommend adverse action. Thus, for large numbers of cases, the two rules not only produce equally determinate results, but the *same* results. Harassment by personnel who possess *Parkins* powers over their victims gives rise to vicarious liability in both the Second and the Seventh Circuits and harassment by those who plainly are *not* the victim's supervisor in the commonly understood meaning of that word does not. Indeed, jettisoning the Seventh Circuit's restriction would largely replace one rule with another no less determinate.

In a larger sense, in fact, the Seventh Circuit rule actually complicates and extends litigation. Unlike other Title VII rules purchasing simplicity that this Court has rejected, see *Crawford* v. *Metro. Gov't*, 555 U.S. 271 (2009) (rejecting rule that dismissed cases involving employees who speak out about discrimination not on their own initiative, but in answering questions during an employer's internal investigation); *Burlington Northern*, *supra* (rejecting rule that dismissed cases involving retaliation only in assignment of work duties); *Oncale*, *supra* (rejecting rule that dismissed cases involving same-sex

harassment); *Robinson* v. *Shell Oil Co.*, 519 U.S. 337 (1997) (rejecting rule that dismissed cases involving former employees), the *Parkins* restriction does not end litigation or even settle the element of employer responsibility. In cases where it finds no supervisory relationship, that determination becomes more complex. In those cases, the jury must determine the employer's negligence, a notoriously difficult issue that turns in part on close analysis of the workers' relationship, the very inquiry the *Parkins* test purports to avoid. See *Doe* v. *Oberweis Dairy*, 456 F.3d 704, 717 (7th Cir. 2006) ("Even if not strictly liable for harassment by a shift supervisor, still the employer must exercise greater care than is required in a case of routine harassment by a coworker. How much greater will normally be a jury question.").

II. The Seventh Circuit's Judgment Must Be Reversed And The Case Remanded For Proper Application Of The *Ellerth/Faragher* Rule

In the courts below, petitioner developed abundant evidence that Davis was in fact her supervisor. That evidence included Davis's job description, which identified her duties as directing and overseeing, J.A. 12, and the testimony of other employees that Davis was a supervisor and that Kimes, the manager, identified her as such, *id.* at 386. It also included BSU internal documents (1) describing Davis as "in a place to *lead at work and do things to [Vance] and get away with it*," *id.* at 5 (emphasis added), (2) describing her as "delegating jobs to [Vance] in the kitchen," *id.* at 66, (3) noting "[Davis's] role as a lead person in the kitchen," *ibid.*, and (4) stating that Davis "*does* * * * give prep sheets

daily," *ibid.* (emphasis added), and "give[s] direction to [Vance]," *id.* at 67.

The courts below granted judgment to BSU on the ground that Davis was not Vance's supervisor under the Seventh Circuit's *Parkins* rule. Neither the district court nor the court of appeals intimated that Vance's evidence would have been insufficient under a standard, like the Second Circuit's, that properly considers directing or overseeing another's work activities a form of "supervision." See, e.g., *Mack* v. *Otis Elevator Co.*, 326 F.3d 116, 125 (2d Cir. 2003); see also *Whitten*, 601 F.3d at 245-246; *McGinest* v. *GTE Serv. Corp.*, 360 F.3d 1103, 1119 n.13 (9th Cir. 2004). Indeed, they are fairly read as assuming the opposite. See Pet. App. 12a-13a, 54a.

Nor did BSU seek summary judgment (or urge affirmance) on this basis. It never disputed that Davis directed Vance's work activities. It understandably rested on the Seventh Circuit rule and argued that "no part of [Davis's job] description includes the power to hire, fire, demote, promote, transfer, or discipline an employee, which are the essential functions of a supervisor as a matter of law." Defts' Summ. J. Reply 17; accord J.A. 409 ("A 'supervisor' at Ball State is a person who has *all, or substantially all, of the following powers*: to hire, fire, demote, transfer, or discipline an employee. Saundra Davis does not have, nor has she ever had, such authority.") (emphasis added). Indeed, respondent's principal summary judgment argument was that Vance's Title VII claim failed for other reasons, "even construing Davis's position as supervisory," Defts' Summ. J. Br. 27; see *id.* at 24, 30, 31 (likewise "assuming" supervisory relationship); cf. Fed. R. Civ.

P. 56(f) (stating judgment on grounds not raised by the moving party is impermissible, absent notice and opportunity for nonmovant to be heard). BSU also did not claim it was entitled to *Ellerth* and *Faragher*'s affirmative defense. In light of its deficient racial harassment policy and Vance's diligent efforts to obtain relief through BSU's internal processes, see pp. 7-9, *supra*, the defense was unavailable.

But as explained, pp. 39-42, *supra*, the Seventh Circuit restriction is spurious. There is no reason or need for excluding supervisors who cannot take tangible employment actions against their victims from the coverage of the *Ellerth/Faragher* rule. Because this case was litigated and decided under an incorrect legal standard, the Court should follow its normal practice of reversing the judgment and remanding for application of the correct legal standard to facts as developed with an eye to that standard. As this Court has held, when the

> courts below appl[y] an incorrect legal standard, we do not consider whether the result would be supportable on the facts of this case had the correct one been applied. We believe * * * that the appropriate disposition is to remand the case to the District Court, for fresh fact-findings, addressed to the statute as we have now construed it.

Malat v. *Riddell*, 383 U.S. 569, 572 (1966) (per curiam); accord *Hertz Corp.* v. *Friend*, 130 S. Ct. 1181, 1195 (2010) (recognizing that parties "should have a fair opportunity to litigate their case in light of our holding" on remand); *Ellerth*, 524 U.S. at 766 (observing that the case had not been litigated with the affirmative defense in view and giving "the

District Court * * * the opportunity to decide" appropriate course on remand); cf. *Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430 (2012) (noting Court practice of "typically remand[ing] for resolution of * * * claims the lower courts' error prevented them from addressing").[10]

This Court can reverse by two means. First, it could simply hold that the Seventh Circuit incorrectly excluded from the coverage of *Ellerth* and *Faragher* those supervisors who direct and oversee the activities of their victims but have no power to take tangible employment actions against them. Second, it could adopt the Second Circuit's rule, that who counts as a "supervisor" depends on "whether the authority given by the employer to the [harassing] employee enabled or materially augmented the ability of the latter to create a hostile work environment for his or her subordinates." *Mack*, 326 F.3d at 126; cf. *Intel* v. *Advanced Micro Devices, Inc.*, 542 U.S. 241, 247 (2004) ("suggest[ing] considerations relevant to the disposition" to "guide * * * on remand"); compare *Thompson* v. *N. Am. Stainless, LP.*, 131 S. Ct. 863, 868 (2011) (declining to "identify

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[10] At the certiorari stage, BSU urged this Court to depart from its ordinary practice of "not consider[ing] whether the result would be supportable on the facts of th[e] case had the correct [legal rule] been applied," *Malat*, 383 U.S. at 572, claiming that it might be entitled to summary judgment under a correct legal standard, see Br. in Opp. 25-29. But this Court should not decide summary judgment under a new legal standard in the first instance, especially since the facts were developed under an incorrect standard. Since the district court itself could not have granted summary judgment on this ground, Fed. R. Civ. P. 56(f) (limiting district courts' authority to grant summary judgment "on grounds not raised by a party"), it would be strange for this Court to entertain affirming on that basis.

a fixed class of relationships for which third-party reprisals are unlawful"), with, e.g., *Burlington Northern*, 548 U.S. at 67 (after rejecting Sixth Circuit rule, selecting two circuits' "formulation" of the proper standard from among competing versions). Although petitioner believes the latter represents the better approach, the choice is for the Court to decide.

The principal effect of either choice would be to expand the vicarious liability rule to actionable harassment by a somewhat larger, but still well-defined, class of individuals: those held out and recognized as supervisors in common parlance with authority to direct and oversee their victim's work activities, but who lack the managerial powers *Parkins* requires. Employer liability would hardly be automatic. The employer could still assert the affirmative defense "(a) that [it] exercised reasonable care to prevent and correct promptly any sexually harassing behavior and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Ellerth*, 524 U.S. at 766; *Faragher*, 524 U.S. at 807.[11] The employer liability rules for the vast majority of other cases, most notably those where the harasser possessed *Parkins* powers and those where he was not, in any real sense, the victim's supervisor, *e.g.*, an employee of equal or lower rank than the plaintiff or

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[11] Significant numbers of employers succeed under this defense, not infrequently on summary judgment. David Sherwyn, Michael Heise & Zev J. Eigen, *Don't Train Your Employees and Cancel Your "1-800" Harassment Hotline: an Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 Fordham L. Rev. 1265, 1288 (2001).

a higher-ranking person outside her chain of command, would be governed, as they already are in all the circuits, by the "supervisor" and "co-worker" standards, respectively.

The Second Circuit's standard offers many benefits. For one thing, it would align the law with both the holdings and underlying reasoning of *Ellerth* and *Faragher*, which the Seventh Circuit rule fails to do, see pp. 28-39, *supra*, and with the EEOC's Guidance.[12] It would also align the law with the holding and reasoning of *Burlington Northern*.

In *Burlington Northern*, this Court held that although actionable retaliation under Title VII is not confined to "tangible employment actions" it does have to be "materially adverse, which in this context means it might well have dissuaded a reasonable worker from making or supporting a charge of discrimination." 548 U.S. at 68 (internal quotation marks and citations omitted). This standard, the Court explained, had three virtues. *Id.* at 68-69. Its materiality requirement "separate[s out] significant from trivial harms" because "petty slights, minor annoyances, and simple lack of good manners will not" deter victims from seeking redress. *Ibid.* Furthermore, it represents "[a]n objective standard [that] is judicially administrable. It avoids the uncertainties and unfair discrepancies that can

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[12] Although the Guidance was issued 14 years ago and does not reflect intervening decisions such as *Suders*, *Burlington Northern*, and *Staub*, the Commission's judgment, experience, and its congressionally assigned role make the Guidance an important, though not controlling, body of expertise from which to draw. Cf. *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1335 (2011).

plague a judicial effort to determine a plaintiff's unusual subjective feelings." *Id.* at 68-69. And finally, its "general terms" acknowledge that "the significance of any given act * * * will often depend upon the particular circumstances." *Id.* at 68.

The Second Circuit's "enable or materially augment" standard not only closely tracks the substance of the *Burlington Northern* standard but also shares these three particular virtues. Its materiality requirement separates out incidental power to direct or oversee another's daily work, like downstream quality monitoring on a production line or the power to direct an employee to one of several identical production lines, from more substantial power that implicates the core concerns of *Ellerth* and *Faragher*. Like the *Burlington Northern* standard, moreover, the Second Circuit standard is "objective" and "judicially administrable." 548 U.S. at 68. Most importantly, the Second Circuit rule, unlike the Seventh Circuit's, is responsive to the realities of the workplace. The rule would recognize, for example, that the power to determine restroom breaks could enable and materially augment harassment when it means one employee can force another to urinate in a public parking lot rather than a private restroom, see *CRST*, 679 F.3d at 687-689, but not when it means only that one employee must clear a restroom break with another to ensure that someone is on duty at all times.

Like the *Burlington Northern* rule, moreover, the Second Circuit standard focuses inquiry on the correct concern. It recognizes that the *fact* of power, not the *type* of power, a supervisor wields over his victims makes supervisor harassment a special

worry. As the Second Circuit held in *Mack*, vicarious liability should turn "on whether the power—economic *or otherwise*, of the harassing employee over the subordinate victim given by the employer to the harasser—enabled the harasser, or materially augmented his or her ability, to create or maintain the hostile work environment." 326 F.3d at 125. Whether that power is economic or not matters little. Both types of power directly implicate the central concerns this Court identified in *Faragher*. See pp. 29-39, *supra*. Under this standard, of course, not all powers of oversight or direction would give rise to vicarious liability—only those that make a difference to the harasser's ability to inflict harm on his victim. Occasional oversight authority, especially if mutual, that added little to a worker's ability to harass others, for example, would clearly not do so; routine oversight and direction, especially if it entailed the power to assign an employee to much less attractive work duties, see *Faragher*, 524 U.S. at 780 ("Date me or clean the toilets for a year."), certainly would.

The Second Circuit rule shares yet another virtue with the *Burlington Northern* standard: it has been tested. And that experience dispels the fears raised by courts following the *Parkins* rule, particularly that the Second Circuit's approach would appreciably increase the extent and complexity of litigation. After a decade, no court applying the Second Circuit rule has complained of this effect. The reason is simple. Employees considering litigation and the attorneys they need to persuade to sue are unlikely to be induced to file suit by the prospect that the Second Circuit standard might govern one "prong" of their multi-element Title VII claim. Even in *Parkins* jurisdictions, moreover, employees who have been

subject to severe workplace harassment by others who direct their daily work activities but have no *Parkins* powers over them regularly seek Title VII redress even though the negligence standard improperly applies. See, e.g., *EEOC* v. *Ceisel Masonry, Inc.*, 594 F. Supp. 2d 1018, 1026 (N.D. Ill. 2009) (permitting case to proceed on negligence standard and noting evidence "establish[ing] * * * notice of widespread use of racial epithets").

The Second Circuit rule also has many other virtues. For starters, it focuses inquiry where it properly belongs: on the particular supervisory relationship, not on general supervisor status. The question is not whether the harasser "was employed in a supervisory capacity," *Swinton*, 270 F.3d at 805, but whether "he is [*the victim's*] supervisor," *id.* at 803. Focusing on whether the supervisor's power over his victim enabled or materially augmented his ability to harass her addresses exactly this.

Thus, in cases where the harasser outranks his victim and even has an impressive title, but his job responsibilities do not entail directing her work, vicarious liability would not ordinarily apply. The facts of *Joens* v. *John Morrell & Co.*, 354 F.3d 938 (8th Cir. 2004), illustrate this. While the harasser was a foreman who outranked the plaintiff, who worked in "the box shop," "[w]ithin the plant, he was a customer of the box shop with no direct authority to control the work of its employees." *Id.* at 940. "Like any irate customer, Johnson could demand that Joens make more boxes for his cut floor line, and he did. But Joens * * * had discretion to decide which boxes to make." *Id.* at 940-941. In such cases, the concerns that animate the vicarious liability regime are

unlikely present. There is no implicit threat and workplace contact is on terms indistinguishable from that with a co-worker. Such an individual may be somebody's supervisor, but not the plaintiff's.

Because the Second Circuit standard focuses on the realities of the particular workplace relationship, "nomenclature" matters little. Someone with a minor title, like the "mechanic in charge" in *Mack*, 326 F.3d at 120, can meaningfully supervise another, just as someone with a grand title may supervise many but not the plaintiff.[13] In analyzing the particular supervisory relationship, the Second Circuit standard focuses attention where it belongs: on the employer-conferred power the harasser has over the victim, not on how much power that he has generally. A law firm associate's religiously based abuse of an administrative assistant assigned to him, whose work he directs and whose performance he evaluates, could give rise to vicarious liability. She would not be his mere "co-worker" in any sense *Ellerth* and *Faragher* recognized—nor in ordinary parlance. Cf. *Dawson* v. *Entek Int'l*, 630 F.3d 928, 937, 940 (9th Cir. 2011) (highlighting that alleged harasser was "trainer and immediate manager" of victim); *Whitten*, 601 F.3d at 245-246 (highlighting importance of the harasser's "rank vis-à-vis that of the victim" in holding employer liable for store manager's harassment) (internal citation omitted).

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[13] On the other hand, an employer's description of the individual's workplace *duties* and *responsibilities*, particularly those relating to the work activities of the victim, would be highly relevant, but, as in *Mack*, direct evidence of workplace realities would control. See 326 F.3d at 120 (noting that higher-ranking "supervisor" "was seldom" on-site).

Conclusion

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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RESPONDENT'S BRIEF

No. 11-556

In the Supreme Court of the United States

MAETTA VANCE,

Petitioner,

v.

BALL STATE UNIVERSITY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the sole employee (Saundra Davis) whose status is at issue in this case possessed the supervisory authority necessary to trigger vicarious liability under Title VII on the part of Ball State University for the alleged employee-on-employee harassment.

RULE 29.6 STATEMENT

Ball State University is a State supported institution of higher education.

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INTRODUCTION

This case concerns what supervisory authority an employee must possess to trigger vicarious liability under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, on the part of an employer for alleged harassment by its employees. Or to put it somewhat differently, the question is when an employee is a "supervisor" for purposes of Title VII. This Court has held that, under agency law principles, employers are vicariously liable for harassment committed by supervisors against their subordinates. *See Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998). But the Court has not defined the amount of authority necessary for an employee to qualify as a supervisor under Title VII. Because the court of appeals reached the correct conclusion that the only employee (Saundra Davis) whose status is at issue lacked the necessary supervisory authority to trigger vicarious liability, the judgment should be affirmed.

The Seventh Circuit believed that, to be a supervisor for purposes of Title VII, an employee must have the authority "'to hire, fire, demote, promote, transfer, or discipline an employee.'" Pet. App. 12a (citation omitted). That test provides a reliable, bright-line rule for determining who is a supervisor. However, although a clear demarcation between supervisors and co-workers is important, Ball State University (Ball State) agrees with petitioner and the United States that the "hire, fire, demote" test does not necessarily capture all employees who may qualify as supervisors. Under the agency principles that this Court has held govern Title VII, vicarious liability also may be triggered when the harassing employee has the

authority to control the victim's daily work activities in a way that materially enables the harassment.

The judgment below should be affirmed because it is clear that Davis lacked the necessary supervisory authority under the proper inquiry. As the United States has explained, there is no evidence that Davis controlled petitioner's daily work activities at all. At most, the evidence could support an inference that she sometimes relayed instructions by others and occasionally took the lead in the kitchen where she worked. But that is not enough to trigger vicarious liability under Title VII. Indeed, when asked point blank whether Davis was her supervisor even "intermittently, once in a while," petitioner replied that she was "not sure." JA 198; *see* U.S. Br. 30-31 & n.4. If that showing were sufficient to make Davis a supervisor for purposes of Title VII, then the standard would be essentially meaningless in distinguishing between supervisors and co-workers. At a minimum, the test would convert that question into a triable issue virtually any time a plaintiff alleges that a harassing employee had *some* ability to oversee, lead, or direct them, even if only on an occasional basis.

Because it is clear on the well-developed record that Davis does not qualify as a supervisor under the correct standard for vicarious liability, there is no basis for this Court to remand the case for further proceedings. It is critical for the Court to provide clear guidance to employers and employees on who qualifies as a supervisor under Title VII. Applying the proper standard to the record facts is the best way to provide such guidance. Remanding the case for the lower courts to do so in the face of the overwhelming record evidence that Davis is *not* a supervisor would signal

that the threshold for establishing supervisory authority is largely indeterminate. That message would seriously undermine any effort by the Court to establish meaningful limits on vicarious liability. The judgment of the court of appeals should be affirmed.

STATEMENT OF THE CASE

A. Workplace At Issue

Ball State University (Ball State) is a state-funded institution of higher education founded in 1918 and located in Muncie, Indiana—in the east central part of the State. It enrolls roughly 22,000 undergraduate and graduate students each year. At all relevant times it has had a policy of not tolerating sexual harassment of employees or students, and of encouraging any employee who believes she has been subjected to sexual harassment to promptly report it. JA 436-50. In addition, despite petitioner's assertion to the contrary (at 7-8), Ball State has at all times had a policy stating that it "will not tolerate" harassment on the basis of race and many other factors as well. Ball State Anti-Harassment Policy at 1, Ex. FFF to Def.'s Evidence in Supp. of Mot. Summ. J., *Vance v. Ball State Univ.*, No. 06-1452 (S.D. Ind.), ECF No. 87-8.

Like most universities, Ball State has thousands of employees engaged in the manifold tasks necessary to run a large enterprise. Its Dining Services Division serves thousands of meals each day to students, faculty, and others. Pet. App. 27a; JA 407. It employs approximately 850 individuals across seven residence hall dining units and other restaurants on campus. Pet. App. 27a. Dining Services is led by Jon Lewis, the Director of Campus Dining Services, whose job it is to oversee the various divisions of Dining Services. JA

407, 451. Lewis is assisted by (among others) Karen Adkins, the Assistant Director of Personnel, Administration, and Marketing. JA 458. Adkins oversees the University Banquet and Catering (UBC) division of Dining Services and reports to Lewis. Pet. App. 27a. UBC—which has about 60 employees—is led by General Manager Bill Kimes, who in turn reports to both Adkins and Lewis. JA 262-63, 408.

Serving directly under Kimes is the UBC Sales and Service Supervisor, the Banquet and Catering Sales and Service Supervisor, and the Banquet and Catering Chef/Supervisor. JA 456, 261-62. This last position, the Banquet and Catering Chef/Supervisor (chef), directly supervises kitchen employees and works along with those employees in the kitchen. JA 427, 213, 302. Among the chef's duties is the creation of daily "prep sheets," which the chef prepares after reviewing the upcoming UBC-catered functions. JA 427-28. The prep sheets list the tasks that must be undertaken to complete orders. *Id.*; *see* Pet. App. 72a (discussing chef's role in preparing prep sheets); JA 277 ("prep lists identify ... the[] duties for the day, and those duties can range anywhere from production of meat and vegetables to finishing an event"). Remarkably, petitioner does not mention the chef in her brief, save for a stray reference in a footnote. Pet. Br. 11 n.3.

The UBC kitchen is staffed with full-time and part-time employees. Positions include full-time catering specialists and full and part-time catering assistants, as well as student assistants. JA 12, 84, 85. The position description for "catering specialist" states that the duties are to "[o]rganize workload and prepare all types of catered foods" for various events. JA 12. The position lists "Kitchen Assistants and Substitutes"

after "Positions Supervised." *Id.* In setting forth more specific "Duties" and "Responsibilities," the description states that catering specialists "[l]ead and direct kitchen part-time, substitute, and student employee helpers via demonstrating, coaching, and overseeing their work to promote efficiency and excellence." JA 13. The job description for "catering assistant" similarly states that the duties are to "[o]rganize workload and prepare all types of catered food" for various events, and to "[l]ead and direct helpers as assigned to the work area." JA 84-85, 87.

Kimes testified that, although broken up into full-time, part-time, and substitute employees with varying levels of experience, the "kitchen staff" all essentially have "the same duties. They're just different levels." JA 277; *see also* JA 366 (catering specialist has only "a little bit more duty" than a catering assistant). For example, some people bake, some people cut vegetables, and some people clean. JA 277-78. But the kitchen staff are "all given prep lists that identify their duties for the day, and those duties can range anywhere from production of meat and vegetable[s] to finishing an event." JA 277. The tasks that employees do each day can change depending on the prep sheet, which the chef prepares (subject to Kimes's ultimate authority to reassign activities). JA 278-79.

Saundra Davis was employed by Ball State in UBC from 1987 until 2000, when she left catering to accept a full-time position elsewhere at Ball State. Davis returned in November 2001 as one of two catering specialists. Petitioner Maetta Vance began working for Ball State in 1989 as a substitute server in UBC. She was promoted to the part-time catering assistant position in 1991 and worked in that position until

January 2007. Petitioner has testified that Kimes was her "supervisor" during this period and completed her annual reviews. JA 109, 117, 120. In 2007, petitioner was promoted to a full-time catering assistant position—which led to a pay raise, a benefits package worth an additional $9,492, and membership in the Ball State bargaining unit, with the rights associated with collective bargaining. Pet. App. 2a, 21a, 71a; JA 407.

Ball State discharged petitioner in 2009 for violating the University's zero-tolerance policy for threats of violence, following an incident in which she told a co-worker "'that [petitioner] needed to get a .380 assault rifle and kill [Ball State's Director of Employee Relations, Melissa Rubrecht].'" *Vance v. Ball State Univ.*, No. 1:09-cv-01501, 2012 WL 28602-JMS-DML, at *1 (S.D. Ind. Jan. 5, 2012) (citation omitted). Petitioner filed a retaliatory discharge claim against Ball State, which was dismissed and not appealed. *Id.* at 4. Petitioner's termination is not at issue here.

B. Allegations Of Harassment

Over several years of her employment with Ball State, petitioner, who is African American, was involved in several confrontations with different Ball State employees in UBC. During this period, petitioner herself also was the subject of complaints by another employee. The only employee whose alleged misconduct is at issue in this Court is Davis. Petitioner did not seek review of the court of appeals' disposition as to any other employee (though her statement of the case suggests that she now wishes to relitigate the entire case). Nevertheless, to provide a full context for petitioner's claim, we discuss the allegations that she has made against other employees as well.

1. Saundra Davis

Petitioner and Davis were friends for about ten years and "got along well" before the alleged events at issue unfolded. JA 112, 151. During her deposition, petitioner described her relationship with Davis as that of "co-workers." JA 151-52. Sometime before 2001, according to petitioner, Davis slapped petitioner on the head after an argument. Pet. App. 3a, 18a, 30a n.5. Petitioner orally complained to Kimes but did not pursue the matter with Human Relations. Petitioner testified that Kimes was her supervisor at the time. JA 108-09. Shortly after petitioner complained, Davis—for reasons unrelated to the alleged slap in 2001—transferred out of UBC to another department to accept a full-time position. Pet. App. 3a.

Several years later, Davis returned to UBC. In November 2005, Davis and petitioner became involved in an altercation involving an elevator. Davis first reported the incident and said that, as petitioner exited the elevator they were both riding, petitioner said to her, "Move bitch ... you are an evil f- - - - - - bitch." *Id.* at 6a; *see also* JA 23. Petitioner then submitted a complaint about the same incident, alleging that Davis stood in petitioner's way as she tried to get off the elevator and said, "I'll do it again," which petitioner took as a reference to the alleged slap in 2001. Pet. App. 3a. Ball State immediately investigated the complaints and found—based in part on a third-party eyewitness account—that it was "more probable than not" that the events "did not transpire as [petitioner] perceived them to occur." JA 82. Nevertheless, Ball State counseled both employees about the appropriate treatment of co-workers. Pet. App. 18a.

Several years later—when she was deposed in this litigation in 2007—petitioner for the first time alleged that, around the same time as the elevator incident, she heard Davis utter the words "Sambo" and "Buckwheat" speaking to another individual. *Id.* at 6a; JA 161. It is undisputed that petitioner did not contemporaneously report this alleged incident (despite filing multiple complaints about other alleged acts of harassment). Pet. App. 6a; JA 161. And petitioner testified in 2007 that she concluded that "[i]t was nothing," and noted her own decision not to report the comments. JA 158, 167-68; *see* JA 158 (calling the references "little words," "little things").

In December 2005, petitioner complained to Kimes that Davis was glaring at her and slamming pots and pans around her. Pet. App. 6a. A year later, in May 2006, petitioner complained that Davis allegedly "blocked" her on the elevator and "stood there with her cart smiling." *Id.* at 6a-7a. She also complained that Davis purportedly smiled at petitioner and gave her "weird" looks in the kitchen. *Id.* at 7a. Ball State promptly investigated each of these incidents but found no basis to take disciplinary action. *Id.*

In August 2007—after Ball State promoted petitioner to her full-time position—petitioner filed a complaint alleging that Davis had asked her in a Southern accent, "Are you scared?" *Id.* In response to this complaint, Ball State launched another investigation. *Id.* Despite Davis's denial of the allegations, Ball State formally warned her to refrain from such behavior. *Id.* A month later, Davis made another complaint against petitioner, alleging that petitioner splattered gravy on Davis and slammed pots and pans around her in the kitchen. *Id.* at 8a.

2. Karen Adkins and Bill Kimes

Petitioner also filed complaints against both Adkins (Assistant Director of Personnel Administration) and Kimes (General Manager of UBC)—her undisputed supervisors while she worked as a catering assistant. In 2006, petitioner complained that Adkins had "mean-mugged" her. *Id.* at 6a-7a, 56a-57a. Ball State investigated the incident but found no basis to take disciplinary action. *Id.* at 7a. The same year, petitioner filed a complaint against Kimes alleging that he was retaliating against her for filing her previous complaints by forcing her to work through breaks. *Id.* Again, Ball State investigated but found no factual basis for the allegation. *Id.* In August 2007, petitioner again complained about Kimes, alleging that he had aggressively approached her while repeatedly yelling a question at her. *Id.* at 7a-8a. BSU investigated the incident and the witness identified by petitioner corroborated Kimes's account of the event. *Id.* at 8a.

3. Connie McVicker

Petitioner also filed a complaint regarding Connie McVicker, a truck driver for UBC. In September 2005, petitioner reported that an employee had told her that McVicker had used the racial epithet "n- - - - -" (outside of petitioner's presence) and that McVicker had stated that her family had ties to the Ku Klux Klan (KKK). Pet. App. 3a. In response, Ball State immediately investigated and verified the allegations. *Id.* at 4a, 16a. After learning of petitioner's complaint, Melissa Rubrecht, Assistant Director of Employee Relations, sent an email to the Director of Employee Relations, stating: "we need to make a strong statement that we will NOT tolerate this kind of language or resulting

actions in the workplace." *Id.* at 4a. Accordingly, although Ball State's four-step disciplinary process called for only a "verbal warning" for first infractions, Rubrecht concluded that "we can justify going beyond our limited prior past history and issue a written warning," and that "we should also strongly advise [McVicker] verbally when we issue this that it must stop NOW and if the words/behavior are repeated, we will move on to more serious discipline up to an[d] including discharge." *Id.* at 4a-5a.

That is what Ball State did. On November 11, 2005, Kimes gave McVicker a written warning for "conduct inconsistent with proper behavior," in violation of University rules. JA 63. The warning further explained that McVicker was being disciplined for using offensive racial epithets, discussing her family's relationship with the KKK, and also "looking intently" and "staring for prolonged periods at co-workers." *Id.* at 63-64. It warned McVicker that racially offensive language would not be tolerated. *Id.* In addition to the written warning, both Kimes and Gloria Courtright (the Assistant Director of the Office of Compliance) met with McVicker separately to discuss her inappropriate and offensive conduct. Pet. App. 5a. Courtright counseled McVicker to avoid petitioner and consider transferring to another department. *Id.*

Shortly after Courtright spoke with McVicker, petitioner complained to Courtright that in November 2005, McVicker had also called petitioner a "porch monkey." *Id.* at 5a. After receiving this complaint, Ball State again immediately investigated it. *Id.* Although McVicker denied making the comment, Ball State "did not stop by accepting a simple denial." *Id.* at 17a. Kimes interviewed the witness petitioner

identified but that witness could not corroborate petitioner's account. *Id.* at 65a. Kimes then advised petitioner that there were no witnesses to substantiate her claim but nevertheless offered to continue to pursue the matter if she wanted him to do so. *Id.*

In December 2005, petitioner complained that McVicker was giving her a hard time at work by glaring at her and slamming pots and pans around her. *Id.* at 5a-6a. And, in April 2007, petitioner filed another complaint alleging that McVicker had said the word "payback" to petitioner. *Id.* at 7a.[1]

C. Procedural History

In October 2006, petitioner filed this action against Ball State and various individual employees, alleging a range of federal and state discrimination claims, including a hostile work environment claim under Title VII. Pet. App. 2a, 7a. After both sides had engaged in extensive discovery, Ball State moved for summary judgment on all of petitioner's claims, and petitioner cross-moved for partial summary judgment on her hostile-work-environment claim. Among other things, in opposing Ball State's motion, petitioner argued that Davis was a supervisor for purposes of Title VII, pointing to the formal job description for "catering specialist" and the fact that she did not "clock in" for work (which petitioner argued showed that "she is a

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[1] On March 12, 2008, petitioner filed a supplemental affidavit in which she complained for the first time about other alleged events occurring in 2008—after petitioner had filed suit and moved for summary judgment. Pet. App. 44a-45a. The court of appeals held that the district court did not abuse its discretion in excluding this evidence, Pet. App. 10a, and petitioner did not seek review of that evidentiary ruling in this Court. *See* Pet. i.

member of management"). Pl.'s Mot. for Partial Summ. J. at 17, *Vance v. Ball State Univ.*, No. 06-1452 (S.D. Ind. Nov. 30, 2007), ECF. No. 75 (Pet. Dist. Ct. Br.); Position Description, Ex. XX to Def.'s Evidence in Supp. of Mot. Summ. J., ECF No. 62-16.

The district court (Barker, J.) granted Ball State's motion for summary judgment, holding that petitioner could not sustain her hostile-work-environment claim against Ball State. Pet. App. 26a-27a. In considering whether Davis was a supervisor for purposes of triggering vicarious liability under Title VII, the court followed Seventh Circuit precedent holding that "'[a] supervisor is someone with the power to directly affect the terms and conditions of the plaintiff's employment,'" which authority "'primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee.'" *Id.* at 53a (citation omitted). The court concluded that Davis was not a supervisor, even assuming that "Davis periodically had authority to direct the work of other employees." *Id.* at 54a.

In evaluating petitioner's claims based on Davis's conduct under the standard for harassment by co-workers, the court concluded that most of petitioner's confrontations with Davis had no "racial character or purpose," and that any racial remarks were not "sufficiently severe or pervasive" to support a hostile work environment claim. *Id.* at 55a. The court further concluded that, even assuming petitioner had suffered severe or pervasive harassment by McVicker, she could not demonstrate a basis for employer liability because Ball State had addressed each of petitioner's complaints in a way "reasonably calculated to foreclose subsequent harassment." *Id.* at 61a, 65a. As for the alleged harassment by Kimes and Adkins—who

concededly were petitioner's supervisors—the court found "no evidence allowing a jury to find that Ms. Adkin's [sic] and Mr. Kimes's alleged behavior was based on race or sufficiently severe and pervasive to be considered objectively hostile." *Id.* at 58a.

The Seventh Circuit affirmed. In challenging the district court's conclusion that Davis was not a supervisor for purposes of Title VII, petitioner argued that "Davis had the authority to tell her what to do" and that "she did not clock-in like other hourly employees." *Id.* at 13a; Reply Brief of Plaintiff-Appellant at 5, *Vance v. Ball State Univ.*, No. 08-3568 (7th Cir. Nov. 10, 2010), ECF No. 51. (Pet. CA7 Reply Br.). The court rejected that argument, explaining that Davis lacked the authority to "'hire, fire, demote, promote, transfer, or discipline'" employees. Pet. App. 12a (citation omitted). Applying the standard for co-worker harassment, the court assumed that McVicker and Davis had created a hostile work environment but concluded that Ball State was not negligent—and therefore not liable—because it "promptly" and thoroughly investigated each of petitioner's complaints and took "disciplinary action when appropriate." *Id.* at 15a. The court also agreed with the district court that the alleged conduct by Kimes and Adkins—who, the court recognized, were petitioner's supervisors—fell "short of the kind of conduct that might support a hostile work environment claim." *Id.* at 13a-14a.

In affirming the judgment for Ball State, the court of appeals stressed that from the point that petitioner filed her first complaint in November 2005, Ball State had taken the complaints seriously and taken disciplinary action where appropriate. The court elaborated that "Ball State did what it could and did

not stop by accepting a simple denial"; that "the record does not reflect a situation in which all ties went to the discriminator"; that Ball State "calibrated its responses depending on the situation"; that Ball State issued warnings and "counseled both employees" even when "it was unsure who was at fault"; and that "Ball State investigated [petitioner's] complaint against Davis in 2007 with the same vigor as it did her complaint in 2005." *Id.* at 17a, 19a.

In short, the court of appeals squarely—and unanimously—rejected the picture that petitioner tries to paint in this Court of an employer who did not take the allegations seriously, when she claims that "[l]ittle was done" in response to her complaints. Pet. Br. 7.[2]

SUMMARY OF ARGUMENT

The judgment of the court of appeals should be affirmed because Saundra Davis—the only employee at issue—was not a supervisor under any plausible inquiry for assessing vicarious liability under Title VII.

A. This Court has held that, in accordance with agency principles, employers may be held vicariously liable under Title VII for discrimination committed by

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[2] In the Seventh Circuit, Ball State did not question the correctness of the court of appeals' "hire, fire, demote" test, which of course was binding circuit precedent for the parties. Ball State explained, however, that Davis did not possess any supervisory authority—even under the considerations that petitioner pointed to (*e.g.*, the job description's reference to "lead and direct") that were not relevant under the Seventh Circuit test. Br. of Appellee at 32-33 & n.5, *Vance v. Ball State Univ.*, No-08-3568 (7th Cir. Oct. 20, 2010), ECF No. 47. In opposing certiorari, Ball State argued that Davis was not a supervisor under any test adopted by another court of appeals or the guidance issued by the Equal Employment Opportunity Commission. Opp. 23-30.

their employees. Ordinarily an employer is liable only for the torts of employees committed "while acting in the scope of their employment." Restatement (Second) of Agency § 219(1) (1958). However, the Court has recognized an exception in limited circumstances when the employee "'was aided in accomplishing the tort by the existence of the agency relation.'" *Id.* § 219(2)(d). Applying that exception, this Court has held that employers can be vicariously liable for harassment committed by supervisors against their subordinates. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 777-78 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 743-44 (1998). A victim of harassment, the Court has observed, may be reluctant to accept the risks of confronting the harasser who possesses supervisory authority. And, as this Court reasoned in *Faragher* and *Ellerth*, the agency relationship can thereby aid such a harasser in perpetrating the harassment.

B. The Seventh Circuit held that employers are vicariously liable under Title VII for harassment committed by employees who have the power to take tangible employment actions—*e.g.*, to hire, fire, or demote—against their victims. Such employees certainly qualify as supervisors for purposes of Title VII, and they may be the most prominent example of employees who may trigger vicarious liability. But the Seventh Circuit rule does not necessarily reach the entire set of employees who may qualify as supervisors under this Court's precedent. Instead, under the agency principles that the Court adopted in *Faragher* and *Ellerth*, vicarious liability also may be appropriate when the employee is authorized to control a victim's daily work activities in a way that materially enables the harassment. Such employees—like the lifeguard in

Faragher—have the ability to "implicitly threaten to misuse their supervisory powers to deter any resistance or complaint" by their victims. *Faragher*, 524 U.S. at 801. And although it may be unusual that an employee actually has that control and yet lacks the authority to take any tangible employment actions, employees who do may qualify as supervisors.

C. An admitted shortcoming of recognizing this broader definition of supervisor is that it could prove difficult for employers and employees alike to tell when an individual is a supervisor rather than a co-worker, or vice versa, for purposes of triggering vicarious liability under Title VII. That consideration, by itself, counsels in favor of the Seventh Circuit rule, which unquestionably provides a bright-line. But the agency principles this Court has adopted appear to foreclose the Seventh Circuit position as a complete answer to who is a supervisor. And, in any event, the broader definition of supervisor can supply a workable rule—when applied in light of several limiting principles that comport with agency principles and existing lower court case law. These principles sharpen the vicarious liability analysis and clarify the boundaries between supervisors and co-workers. The courts of appeals that have rejected the "hire, fire, demote" test have pointed to such considerations in distinguishing between supervisors and co-employees. The principles are also consistent with the enforcement guidance issued by the Equal Employment Opportunity Commission (EEOC) on the vicarious liability of employers.

Although the considerations that may be decisive in any given case may vary, agency principles and existing case law support the following principles in determining whether an employee is a supervisor:

- An employee's status turns on the facts and realities of the workplace, and not on titles, formal job descriptions, or labels.
- An employee's authority to control the victim's daily work activities must include the power either to increase the victim's workload, or to assign the victim undesirable tasks.
- An employer is not vicariously liable if the victim is unaware of authority that an employee does have to control her daily activities.
- The inquiry should consider the extent to which the victim has on-the-scene access to the chain-of-command or whether the alleged harasser is the highest-ranking employee on site.
- If an employee's authority over the victim's daily activities is temporary or intermittent, vicarious liability is triggered only for harassment that occurs when the employee actually possesses the relevant powers.

These principles establish meaningful boundaries on vicarious liability and provide the needed guidance to employers, victims, and courts for establishing when such liability is triggered by an employee's actions.

D. Davis does not remotely qualify as a supervisor under Title VII. It is undisputed that she lacked the authority to take tangible employment actions. In addition, there is no evidence that Davis had the authority to control petitioner's day-to-day activities, much less that she exercised authority to increase petitioner's workload or assign her undesirable tasks. And when pressed, petitioner herself testified that she did "not know" whether Davis was her supervisor—hardly what one would typically say of a person who actually *controlled her daily activities*. Moreover,

petitioner did not hesitate to confront Davis and tell her "where to go." Davis was never the highest authority on site because both Kimes and the chef worked on site. And while petitioner hinges her case on Davis's formal job description, that description does not trump the facts and practical realities of the situation. The bottom line is that Davis did not possess supervisory authority that materially enabled the alleged harassment, and Ball State is therefore not vicariously liable for Davis's alleged conduct.

E. Because it is clear on the well-developed record that Davis does not qualify as a supervisor under even the broader test for supervisor, the Court should affirm the judgment below. Although this Court often remands for application of a new standard, it by no means always does so. When, as here, it is evident that a party cannot meet the new standard in light of the existing record, or that application of the standard to the facts would provide valuable guidance in elucidating the standard, this Court often proceeds to resolve the issue on the record before it. That is the right path here. Indeed, petitioner herself argues that guidance is needed from this Court on the proper standard. Pet. Br. 17. The best way to provide that guidance is to apply the standard to the record facts, and to hold that Davis lacked supervisory status.

ARGUMENT

DAVIS DID NOT EXERCISE ANY SUPERVISORY AUTHORITY OVER PETITIONER THAT COULD TRIGGER VICARIOUS LIABILITY UNDER TITLE VII

The question in this case is when is an employee a supervisor for purposes of Title VII, such that his actions may trigger vicarious liability on the part of the employer. Although it provides a bright-line rule, the Seventh Circuit's "hire, fire, demote" test does not necessarily describe all employees who may count as supervisors for purposes of Title VII. Instead, under the agency principles this Court has adopted in construing Title VII, it is more accurate to say that vicarious liability is triggered when an employee's authority materially enables his harassment of the victim. That condition is always satisfied when the harasser has the power to take a tangible employment action against the victim, and an employee with such authority is the prototypical example of a supervisor. But the test may also be satisfied when a harasser has the authority to control the victim's daily work activities in a way that materially enables the harassment. The judgment below should be affirmed because Davis was not a supervisor under that test.

A. Title VII Invokes Agency Principles To Limit The Vicarious Liability Of Employers For Employee Misconduct

Title VII makes it unlawful for an "employer" to discriminate against any individual in the workplace on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a). This Court has rejected the notion that employers may be held strictly liable under

Title VII for discrimination committed by their employees. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72 (1986). Rather, drawing from the fact that Title VII defines "employers" to include "agents," 42 U.S.C. § 2000e-2(b), the Court has held that the vicarious liability of employers must be determined in accordance with principles of agency law. *Ellerth*, 524 U.S. at 742 (noting that Title VII defines "employer" to include "agents," and that Congress thereby "directed federal courts to interpret Title VII based on agency principles"); *Faragher*, 524 U.S. at 791-92 (instructing courts to "look to traditional principles of the law of agency in devising standards of employer liability"); *Meritor Sav. Bank*, 477 U.S. at 72 (same); *see also Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1190-91, 1194 n.3 (2011) (noting similarity between Title VII and the Uniformed Services Employment and Reemployment Rights Act and applying *Faragher* and agency principles to determine scope of employer liability).

A baseline rule of agency law is that an employer is only liable for the torts of employees committed "while acting in the scope of their employment." Restatement (Second) of Agency § 219(1), (2); *see Ellerth*, 524 U.S. at 756 (relying on Restatement (Second) of Agency § 219(1)). This rule applies to both intentional and negligent misconduct. It renders an employer liable for an employee's torts whenever "the employee's 'purpose, however misguided, is wholly or in part to further the master's business.'" *Ellerth*, 524 U.S. at 756 (quoting W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts* § 70, 505 (5th ed. 1984)).[3]

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[3] *See also, e.g.*, Restatement (Second) of Agency § 219 cmt. a (noting assumption that "the master can exercise control over the

This Court has held that, as a "general rule," workplace harassment carried out for personal motives unrelated to the employer "is not conduct within the scope of employment." *Ellerth*, 524 U.S. at 757; *see also Faragher*, 524 U.S. at 798-800. Employers are therefore not automatically liable for such misconduct under Title VII. This Court has also recognized, however, that in certain "limited circumstances" agency law imposes employer liability even for misconduct committed outside the scope of employment. *Ellerth*, 524 U.S. at 758. Those circumstances are set forth in Restatement (Second) of Agency § 219(2). They generally involve situations in which the employer indirectly contributes to the commission of the tort and thus can fairly be held morally responsible and financially accountable under Title VII. *See Ellerth*, 524 U.S. at 758-60 (quoting Restatement (Second) of Agency § 219(2)(d)).

In the hostile-work-environment context, the Court has invoked the Restatement (Second) of Agency's exception to the scope-of-employment requirement in situations when the employee "was aided in accomplishing the tort by the existence of the agency

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physical activities of the servant" during the time of service); *Faragher*, 524 U.S. at 797 (explaining that the "ultimate question" in deciding application of scope-of-employment rule is "'whether or not it is just that the loss resulting from the servant's acts should be considered as one of the normal risks to be borne by the business in which the servant is employed'" (quoting Restatement (Second) of Agency § 229 cmt. a)); *Taber v. Maine*, 67 F.3d 1029, 1037 (2d Cir. 1995) (citing leading treatise for proposition that "'the integrating principle' ... is 'that the employer should be liable for those faults that may be fairly regarded as risks of his business'" (citation omitted)); Keeton *et al.*, *supra*, at 505 (observing that the "employer is to be held liable for those things which are fairly to be regarded as risks of his business").

relation." Restatement (Second) of Agency § 219(2)(d); *see Faragher*, 524 U.S. at 802 *Ellerth*, 524 U.S. at 759. The Court has interpreted this exception to authorize vicarious liability under Title VII when an employee's "tortious conduct is made possible or facilitated by the existence of the actual agency relationship." *Faragher*, 524 U.S. at 802. Applying the exception, this Court has held that employers can be vicariously liable for harassment committed by "a supervisor" against a subordinate, when "made possible by abuse of his supervisory authority." *Id.*; *Ellerth*, 524 U.S. at 760-66.

Vicarious liability for harassment committed by a supervisor comports with agency principles because supervisory authority can aid his commission of the tort. *See* Restatement (Second) of Agency § 219(2)(d). Indeed, "[w]hen a person with supervisory authority discriminates in the terms and conditions of subordinates' employment, his actions necessarily draw upon his superior position over the people who report to him." *Faragher*, 524 U.S. at 803. As this Court has explained, an employee who qualifies as a supervisor for Title VII purposes controls the work environment in which his subordinates operate. He wields the power to impose "sanctions"—formal or informal—for disfavored conduct, and subordinates thus typically have a strong desire to avoid displeasing him. *See id.* at 805 (recognizing that statements by supervisors, unlike those by co-workers, are implicitly backed by "threat[]" of "sanctions"). The classic example of an employee who possesses such authority is the lifeguard in *Faragher* (Silverman), who controlled "all aspects of [the victim's] day-to-day activities." *See id.* at 780-82, 808; *infra* at 26-27.

Because a supervisor can punish employees, his "power and authority" to exact reprisals can "invest[] his or her harassing conduct with a particular threatening character." *Ellerth*, 524 U.S. at 763. The potential threat to one's livelihood or working conditions will make the victim think twice before resisting harassment or fighting back. As this Court has noted, "'[i]t is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome [harassing] conduct on subordinates.'" *Id.* (quoting *Meritor Sav. Bank*, 477 U.S. at 77 (Marshall, J., concurring)). Ultimately, the supervisor's authority makes it difficult for the victim to "blow[] the whistle on a superior," to "walk away" from the harassment, or to "tell the offender where to go." *Faragher*, 524 U.S. at 803; *see* Pet. Br. 37 (noting that "central concern" of *Ellerth* and *Faragher* is to "protect[] victims reluctant to run the 'risk of blowing the whistle'" on their supervisors (citation omitted)); U.S. Br. 8 (same).

In short, under this Court's precedent, the supervisory authority that matters under Title VII is authority that enables harassment—and thus triggers vicarious liability under agency principles—by making it harder for the victim to resist the harassment.[4]

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[4] Title VII does not use or define the term "supervisor," though Congress has used that term in other statutes. In particular, the National Labor Relations Act (NLRA), 29 U.S.C. § 152(11), defines the term "supervisor." Ball State agrees with the EEOC (Pet. App. 88a) that, because of the different considerations underlying Title VII and the NLRA, the NLRA's definition does not answer the question presented here. To the extent that the NLRA definition has any bearing on the question presented here, it underscores that Congress appreciates that not

B. To Trigger Vicarious Liability, An Employee Must Exercise Supervisory Authority Over The Victim That Materially Enables The Harassment

Although this Court has held that employers can be vicariously liable for harassment committed by supervisors (*see Ellerth* and *Faragher*), the Court has never articulated the scope of supervisory authority necessary to trigger such liability, or demarcated the line between supervisor and co-employee for purposes of Title VII. Nevertheless, the agency principles discussed above lead to the conclusion that a harassing employee may qualify as a supervisor not only when he has the power to take tangible employment actions against his victim, but also when he exercises the power to control the victim's daily activities in a way that materially enables the harassment. The latter category is the focus of the dispute in this case.

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every employee with *some* kind of authority to direct, lead, or oversee other employees qualifies as a supervisor for all purposes. As this Court has recognized, in enacting the NLRA's definition of "supervisor," Congress sought to include employees "vested with ... genuine management prerogatives," while excluding "employees with minor supervisory duties" (*e.g.*, "straw bosses," "leadmen," and "set-up men"). S. Rep. No. 80-105, at 4 (1947); *NLRB v. Health Care & Retirement Corp. of Am.*, 511 U.S. 571, 587-88 (1994) (Ginsburg, J., joined by Blackmun, Stevens, and Souter, JJ., dissenting); *see also, e.g., Stop & Shop Cos. v. NLRB*, 548 F.2d 17, 19 (1st Cir. 1977) ("mere fact that an employee may give some instructions to others" does not make him a supervisor under NLRA).

1. Vicarious Liability Is Naturally Triggered When The Harassing Employee Has The Power To Take Tangible Employment Actions Against The Victim

The test for supervisory authority is always met when an employee has the power to undertake or recommend tangible employment actions against the victim, such as "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S. at 761-63. As the EEOC has explained, a supervisor's power to undertake or recommend tangible employment decisions is necessarily "of a sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment." Pet. App. 89a (EEOC 1999 Enforcement Guidance); *see Mikels v. City of Durham*, 183 F.3d 323, 333 (4th Cir. 1999) (observing that authority to take "tangible employment actions" is the "most powerful indicator" of "vulnerability deriving from the supervisor's agency relation").

When an employee actually undertakes the tangible employment action as part of his harassment, the employer is automatically liable for the Title VII violation. *Ellerth*, 524 U.S. at 761, 762-63; *Faragher*, 524 U.S. at 807. In such cases, the action "becomes for Title VII purposes the act of the employer," and there is no question that the supervisory relationship directly aids the harassment. *Ellerth*, 524 U.S. at 762-63. By contrast, when an employee possesses the authority to take tangible employment actions—but does not exercise that power as part of the alleged harassment—the employer is vicariously liable subject to an affirmative defense that may negate liability. To

prevail on that defense, the employer must show (1) that it "exercised reasonable care to prevent and correct promptly any ... harassing behavior," and (2) that the victim "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.* at 765; *see also Faragher*, 524 U.S. at 807.

2. Vicarious Liability May Be Triggered When The Harassing Employee Has The Power To Control The Victim's Daily Activities In A Manner That Materially Enables The Alleged Harassment

Although the Court did not squarely address the question, *Ellerth* and *Faragher* strongly suggest that vicarious liability is appropriate when the harassing employee's right to control the victim's daily activities materially enables the harassment. Such employees have the ability to "implicitly threaten to misuse their supervisory powers to deter any resistance or complaint" by their victims. *Faragher*, 524 U.S. at 801. The result may be to "intimidate" the victims and thereby facilitate the harassment. U.S. Br. 14. As the United States has explained, under *Ellerth* and *Faragher* "a victim of harassment may be reluctant to accept the risks of confronting a harasser who has supervisory authority," and so "the agency relationship between the employer and the supervisor thus aids the harasser in accomplishing the harassment." *Id.* at 8. Recognizing that an employee who possesses such authority over a victim is a supervisor for purposes of Title VII is consistent with agency principles as well as with a common-sense meaning of "supervisor."

Faragher illustrates when this test will be satisfied. The victim in that case (Beth Ann Faragher) was a

female lifeguard for the City of Boca Raton who was sexually harassed by her two immediate supervisors in a "clear chain of command"—Bill Terry and David Silverman. *Faragher*, 524 U.S. at 780-83. Terry had the power to take tangible employment actions against Faragher, but Silverman did not. *Id.* at 781. Rather, Silverman was "responsible for making the lifeguards' daily assignments, and for supervising their work and fitness training." *Id.* Faragher reported directly to Silverman, who had "'virtually unchecked authority'" over Faragher and her fellow lifeguards. *Id.* at 808. The record established that Silverman "'directly controll[ed] and supervis[ed] all aspects of [their] day-to-day activities,'" and designated her work and shift assignments as well. *Id.* at 781, 808. And Silverman used this supervisory authority to threaten Faragher, telling her, "'Date me or clean the toilets for a year.'" *Id.* at 781 (citation omitted). This Court concluded that the City was vicariously liable for Silverman's harassment as well as Terry's. *Id.* at 808 (citation omitted); *see also* Pet. App. 91a-92a (EEOC 1999 Enforcement Guidance) (discussing *Faragher*).[5]

The Seventh Circuit correctly recognized that vicarious liability exists when an employee has the power to take tangible actions against the victim. But under the agency principles adopted in *Faragher* and *Ellerth*, vicarious liability is not necessarily limited *only* to employees who possess such authority. *See*

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[5] Because Silverman's supervisor status was not at issue before this Court in *Faragher*, the Court's treatment of Silverman does not dispose of the question presented here. Nevertheless, it appears difficult to square *Faragher* with the conclusion that vicarious liability is triggered only when an employee has the authority to take tangible employment actions against a victim.

Pet. App. 12a-13a (citing *Hall v. Bodine Elec. Co.*, 276 F.3d 345, 355 (7th Cir. 2002); *Rhodes v. Illinois DOT*, 359 F.3d 498, 506 (7th Cir. 2004)). Although it may be unusual for an employee to control "all aspects" (*Faragher*, 524 U.S. at 781) of an employee's daily activities and *not* have the authority to take tangible employment actions against the employee as well, the agency principles this Court has adopted support the conclusion that an employee who does wield such power is a supervisor for purposes of Title VII as well.

The Seventh Circuit rule has the salutary effect of providing employers, employees, and courts with a bright-line test for determining when an employee is a supervisor. And a clear rule for distinguishing between supervisors and co-workers promotes the objectives of Title VII—*e.g.*, by ensuring that employers can identify and train supervisors. But, at least as long as the Court recognizes meaningful and workable limits on the broader definition of supervisor, those considerations—while undoubtedly important—are insufficient to deviate from the agency law principles that this Court has already adopted in this context. As discussed next, agency principles and existing lower court case law supply such limits.[6]

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[6] The Seventh Circuit appears to have initially started down the right path. As petitioner notes, the Seventh Circuit standard originated in *Parkins v. Civil Constructors of Ill., Inc.*, 163 F.3d 1027 (7th Cir. 1998). Pet. Br. 4. In that case, the court observed that the requisite supervisory authority "*primarily* consists of the power to hire, fire, demote, promote, transfer, or discipline an employee." *Parkins*, 163 F.3d at 1034 (emphasis added). As the EEOC has recognized, *Parkins* did not explicitly rule out the possibility that supervisory authority could exist in other circumstances. U.S. Br. 29. To the contrary, in determining whether vicarious liability was triggered on the facts before it in

C. The EEOC's Enforcement Guidance And Lower Court Case Law Provide Important Limits On The Scope Of Vicarious Liability In This Context

1. Drawing from *Faragher*, the EEOC and the Second Circuit and the Fourth Circuit have concluded that vicarious liability may be triggered in two sets of circumstances: (1) when an employee is authorized to take tangible employment actions against the victim; and (2) when the employee controls the victim's daily work activities. Although these circuits and the EEOC have used slightly different formulations to describe the requisite level of supervisory authority, they have agreed that vicarious liability ultimately turns on whether the authority enabled the harassment.

The EEOC's 1999 Enforcement Guidance recognizes the core principle established by *Ellerth* and *Faragher* that "vicarious liability for supervisor harassment is appropriate because supervisors are aided in [their] misconduct by the authority that the employers delegated to them." Pet. App. 89a. It then notes that liability is appropriate when the authority is "of sufficient magnitude so as to assist the harasser

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Parkins, the court looked to more than simply whether the employee was empowered to take tangible employment actions against the victim. *See id.*; *Parkins*, 163 F.3d at 1034-35 (summarizing evidence); *id.* at 1035 (concluding that, because the harassing employees "exercised almost no control over truck drivers [like the plaintiff], they clearly were not supervisors"). Nevertheless, in *Rhodes*, 359 F.3d at 506, the Seventh Circuit read *Parkins* to hold that an employee *must* be authorized to take tangible employment actions against the victim to be a supervisor under Title VII. That is where the Seventh Circuit veered off the path marked by the Court's precedent.

explicitly or implicitly in carrying out the harassment," such as when a supervisor "is authorized to direct another employee's day-to-day work activities." *Id.* at 89a, 91a. As the United States has explained, the EEOC Guidance also recognizes definite "limits on who should qualify as a supervisor by virtue of authority to direct another employee's daily activities." U.S. Br. 27. These limits are "directly tied to whether harassment would be 'aided by the agency relation' in specific circumstances." *Id.* (citation omitted).

The Second Circuit has embraced the EEOC's reasoning that—for an employer to be vicariously liable based on a supervisor's authority to direct the victim's daily work activities—that authority must actually enable the harassment. As the court has explained, "[v]icarious liability ... depends on whether the power—economic or otherwise, of the harassing employee over the subordinate victim given by the employer to the harasser—enabled the harasser, or materially augmented his or her ability, to create or maintain the hostile work environment." *Mack v. Otis Elevator Co.*, 326 F.3d 116, 125 (2d Cir. 2003).

In defining the level of supervisory authority that triggers vicarious liability under Title VII, the Fourth Circuit likewise has focused on "'whether the particular [harassing] conduct [i]s aided by the agency relation.'" *Whitten v. Fred's, Inc.*, 601 F.3d 231, 244-45 (4th Cir. 2010) (citation omitted). As that court has put it, the "determinant" for vicarious liability is "whether as a practical matter [the supervisor's] employment relation to the victim was such as to constitute a continuing threat to her employment conditions that made her vulnerable to and defenseless against the

particular conduct in ways that comparable conduct ... would not." *Mikels*, 183 F.3d at 332-33.

Petitioner recognizes that the EEOC Enforcement Guidance and the Second and Fourth Circuit standards for imposing vicarious liability all reflect the same core agency principles, and has urged the Court to adopt those principles. Pet. Br. 5, 45-51. But although the parties appear to agree on the basic standard for supervisory status, we disagree over whether Davis is a supervisor under that standard. That disagreement suggests that—while petitioner has ostensibly embraced the EEOC Enforcement Guidance and the Second Circuit and Fourth Circuit tests—she is not willing to embrace the doctrinal implications of that position. And that in turn suggests that the parties still disagree in important ways about the standard. The resolution of that disagreement is critical to answering the question presented and ensuring that there are meaningful limits on vicarious liability.

2. The EEOC Enforcement Guidance and case law from the Second Circuit and Fourth Circuit supply several important limiting principles that govern when an employee possesses supervisory authority capable of triggering vicarious liability, notwithstanding that the employee lacks the authority to take tangible employment actions. Although the importance of any given principle listed below may vary based on the circumstances, together the principles supply workable guideposts grounded in agency law for identifying when vicarious liability is appropriate.

First, the supervisory inquiry turns on a careful consideration of the facts and realities of the situation, not on titles, formal job descriptions, or labels. As the EEOC has explained, the determination "is based on

[the supervisor's] job function rather than job title (*e.g.*, "'team leader'") and must be based on the specific facts" of each particular case. Pet. App. 89a-90a; *see also* U.S. Br. 21, 27-28 (same); Pet. Br. 51 & n.13 (noting that the proper focus is on "the realities of the particular workplace relationship," that "'nomenclature' matters little," and that "direct evidence of workplace realities ... control" the analysis (citation omitted)). It is therefore not enough that an employee or position is labeled "supervisor." Rather, courts must look beyond labels, consider the underlying situation, and determine whether a supervisory relationship existed and helped make the harassment possible in each individual case.

Second, to trigger vicarious liability, an employee's authority to control the victim's daily work activities must include the power either to materially increase the victim's workload, or to assign the victim truly undesirable tasks. That is consistent with the threat of "sanction" that this Court referred to in *Faragher*. 524 U.S. at 805. That requirement properly ensures that the supervisor's authority is "of a sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment." Pet. App. 89a (EEOC Enforcement Guidance). The power to inflict undesirable consequences—like the power of the lifeguards in *Faragher* to force the victim to "clean the toilets for a year," 524 U.S. at 780—inhibits a victim's will to resist and thus enables the harassment.[7]

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[7] *See, e.g.*, *Faragher*, 524 U.S. at 808 (supervisor had "'virtually unchecked authority'" over victim (citation omitted)); *Whitten*, 601 F.3d at 236 (supervisor had power to order victim to stay late to clean and work all night if necessary; to assign her to work on previously-scheduled days off; and to make her life "a

Both the EEOC and the Second Circuit have embraced this requirement. The EEOC Enforcement Guidance explains that it is appropriate to impose vicarious liability when a supervisor "is authorized to direct another employee's day-to-day work activities," because "[s]uch an individual's ability to commit harassment is enhanced by his or her authority to increase the employee's workload or assign undesirable tasks." Pet. App. 90a. The Second Circuit also has held that vicarious liability requires a supervisor to have "actual authority to ... direct another employee's day-to-day work activities in a manner that may increase the employee's workload or assign additional or undesirable tasks." *Mack*, 326 F.3d at 126-27 (adopting holding of *Dinkins v. Charoen Pokphand USA, Inc.*, 133 F. Supp. 2d 1254, 1266 (M.D. Ala. 2001)). And both the United States and petitioner appear to agree with this requirement as well.[8]

'living hell'"); *Mack*, 326 F.3d at 120, 127 (supervisor had power to assign, schedule, and direct work); *see also Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 70-71 (2006) (discussing the coercive power that comes with being able to "insist that [an employee] spend more time performing more arduous duties and less time performing those that are easier or more agreeable").

[8] *See* U.S. Br. 27 (imposing vicarious liability "when an employee has authority to direct another employee's day-to-day work activities" and can therefore "'increase the employee's workload or assign undesirable tasks'" (citation omitted)); Pet. Br. 4-5 (arguing that Title VII imposes liability for supervisors who direct daily work activities "because the employee's ability to harass 'is enhanced by his or her authority to increase the employee's workload or assign undesirable tasks'"); *see also Noviello v. City of Bos.*, 398 F.3d 76, 96 n.5 (1st Cir. 2005) (noting that the Second Circuit "considers a supervisor to be someone who has actual authority to direct an employee's work-related tasks in a way that could increase her workload or saddle her with

Ostensible supervisory power falling short of this authority does not trigger vicarious liability. For example, the EEOC Enforcement Guidance states that an employee "who merely relays other officials' instructions regarding work assignments and reports back to those officials"—or "who directs only a limited number of tasks or assignments"—is not a supervisor for purposes of Title VII. Pet. App. 92a; U.S. Br. 27-28 (emphasis added). Without the potential to intimidate the victim and dissuade her from resisting the harassment, such responsibilities do not facilitate the supervisor's misconduct. Petitioner appears to agree, observing that "not all powers of oversight or direction ... give rise to vicarious liability—only those that make a difference to the harasser's ability to inflict harm on his victim." Pet. Br. 49; *see id.* (noting that "[o]ccasional oversight authority ... that added little to a worker's ability to harass others" does not trigger employer liability); *id.* at 48 (same for "incidental power to direct or oversee ... work").[9]

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less desirable tasks"); *Wiercinski v. Mangia 57, Inc.*, No. 09 Civ. 4413 (ILG) (JO), 2012 U.S. Dist. LEXIS 85043, at *31 n.12 (E.D.N.Y. June 18, 2012) (citing *Mack* for proposition that supervisor must have authority to increase workload or assign undesirable tasks); U.S. Br. 21, *Mack v. Otis Elevator Co.*, 326 F.3d 116 (2d Cir. 2003) (supporting vicarious liability because supervisor "had the authority to give [the victim] the least desirable maintenance tasks or withhold training opportunities if she rejected or complained about his advances"); U.S. Br. 22, *Weyers v. Lear Operations Corp.*, 359 F.3d 1049 (8th Cir. 2004) (supporting vicarious liability because supervisor "had the authority to give [the victim] the least desirable production tasks or withhold training opportunities").

[9] *See also Howard v. Winter*, 446 F.3d 559, 566 (4th Cir. 2006) (rejecting vicarious liability when supervisor had only "occasional authority ... to direct [the victim's] operational duties"); *Joens v.*

Third, the employer is not liable when the victim is unaware of a supervisor's authority to control her daily activities. The very premise of vicarious liability is that the supervisor's power aids his harassment of the victim by implicitly threatening retribution. *See Ellerth*, 524 U.S. at 763 (noting that supervisor is aided by agency relation because his "power and authority invests his or her harassing conduct with a particular threatening character" and "'[i]t is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome [harassment] on subordinates'" (quoting *Meritor Sav. Bank*, 477 U.S. at 77 (Marshall, J., concurring in judgment))). Accordingly, when a victim is unaware that the harasser has the requisite supervisory authority, that authority carries no such

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John Morrell & Co., 354 F.3d 938, 939-40 (8th Cir. 2004) (fact that alleged harasser was a "shift foreman" in a "box shop" who could demand that the victim "make more boxes" was not in itself sufficient to trigger vicarious liability); *Mikels*, 183 F.3d at 333 (explicitly recognizing that "not all harassment even by 'supervisory' employees necessarily" is aided by agency relationship and triggers vicarious liability, and that test is "whether as a practical matter [the supervisory authority over the victim] was such as to constitute a continuing threat to her employment conditions that made her vulnerable to and defenseless against the particular conduct in ways that comparable conduct by a mere co-worker would not"); *Martinsky v. City of Bridgeport*, 814 F. Supp. 2d 130, 151 (D. Conn. 2011) (rejecting automatic vicarious liability when harasser is "'a low-level supervisor who does not rely on his supervisory authority in carrying out the harassment'" (quoting *Murray v. New York Univ. Coll. of Dentistry*, 57 F.3d 243, 249 (2d Cir. 1995)); U.S. Br. 27 (recognizing "limits"—flowing from aided-by-agency-relationship principle—on "who should qualify as a supervisor by virtue of authority to direct another employee's daily activities").

threat, it does not materially enable the misconduct, and it cannot be the basis of vicarious liability.[10]

Relatedly, a victim's willingness to resist can establish that the harasser's authority did not materially enable the harassment. As the Fourth Circuit has explained, "where the level of authority had by a harasser over a victim—hence her special vulnerability to his harassment—is ambiguous, the tip-off may well be in her response to it. Does she feel free to 'walk away and tell the offender where to go,' or does she suffer the insufferable longer than she otherwise might?" *Mikels*, 183 F.3d at 334. In such circumstances, the victim's refusal to tolerate the misconduct can be "highly probative" of the fact that the supervisory authority did not "increas[e] [the victim's] sense of vulnerability and defenselessness" or thereby enable the harassment. *Id.* at 333; *see also id.* at 334 (concluding that victim's profanity-laced outburst against the harasser, and filing of formal grievance, demonstrated that harasser's authority did

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[10] *See generally, e.g., Browne v. Signal Mountain Nursery, L.P.*, 286 F. Supp. 2d 904, 914 (E.D. Tenn. 2003) (explaining that Second Circuit and EEOC tests require analysis of "the victim-employee's understanding of and appreciation for" the supervisory authority, and her response to the harassment, to determine whether vicarious liability is appropriate); *Entrot v. BASF Corp.*, 819 A.2d 447, 459 (N.J. Super. Ct. App. Div. 2003) (relying on Title VII case law to hold that supervisor liability under New Jersey anti-discrimination law applies when "the power the offending employee possessed *was reasonably perceived by the victim* ... as giving that employee the power to adversely affect the victim's working life" (emphasis added)); *cf.* U.S. Br. 30-31 & n.4 (relying on evidence demonstrating that petitioner lacked a reasonable belief that Davis was her supervisor in arguing that vicarious liability was not triggered).

not facilitate harassment by making her more vulnerable or defenseless). The victim's refusal to tolerate the harassment can signal that the supervisory authority at issue was insufficient to trigger vicarious liability under Title VII.

Fourth, a key factor in evaluating whether a supervisor's authority to direct daily work activities enabled the alleged harassment is the extent to which the victim has on-the-scene access to her chain-of-command or whether the alleged harasser is the highest-ranking employee on-site. When the victim is "completely isolated from the [employer's] higher management," it will be harder for the victim to report any harassment up the chain of command—and, accordingly, her supervisor's day-to-day control of her work life will facilitate that harassment. *See, e.g.*, *Faragher*, 524 U.S. at 808 (highlighting victim's isolation from employer's "higher management" in imposing vicarious liability on the basis of the authority possessed by her on-site supervisors); *Mikels*, 183 F.3d at 334 (rejecting vicarious liability in part because victim "was not isolated from the continuing protective power of higher management" and had "immediate access" to more senior supervisors to whom she could report misconduct).

Finally, as the United States explains, "if an employee is only temporarily authorized to direct the daily work activities of another, the employer is vicariously liable only for unlawful harassment that occurs during that temporary period." U.S. Br. 28; *see* Pet. App. 92a (EEOC Enforcement Guidance) (same). Supervisory authority that the harasser does not possess when he commits the harassment obviously cannot materially enable that same harassment.

3. These principles place meaningful and workable limits on when vicarious liability may be triggered based on the exercise of supervisory authority. The adoption of such principles is critical to vindicating the fundamental rule—embraced by Congress, announced in *Meritor Savings Bank*, and reaffirmed in *Faragher* and *Ellerth*—that employers are not strictly liable for all unlawful Title VII harassment committed by their employees. *Meritor Sav. Bank*, 477 U.S. at 72; *Ellerth*, 524 U.S. at 763-64; *Faragher*, 524 U.S. at 792. An indeterminate and manipulable standard also would undermine the objective of ensuring that employers can identify employees who are supervisors for purposes of Title VII and train them to avoid, detect, and prevent harassment. Moreover, failing to adopt meaningful limits on supervisory status would upset the carefully calibrated scheme established by this Court for proving a hostile-work-environment claim. That scheme imposes vicarious liability—subject to an affirmative defense—when the harasser is the victim's supervisor, but not when he is the victim's co-employee (where the plaintiff bears the burden of proving negligence to establish employer liability). *See Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 759.

If this Court disagrees with these limiting principles—or, more fundamentally, rejects the notion that *Ellerth* and *Faragher* incorporate agency-law restrictions on vicarious liability—then the Court should adopt the Seventh Circuit's bright-line standard. That standard undeniably provides the kind of clarity necessary to put employers and employees on notice of their legal rights and obligations. And to the extent that this approach might limit employer liability in some cases, it would still allow for recovery by any

victim capable of showing that her employer was responsible for the harassment through negligence or intentional misconduct. *See Faragher*, 524 U.S. at 789. In other words, the cost of such a rule to the employee likely would be marginal, though the gain to all in clarity and workability would be significant.

D. Davis Did Not Exercise Any Supervisory Authority Over Petitioner That Could Trigger Vicarious Liability

If this Court adopts the Seventh Circuit's "hire, fire, demote" test, then Davis undeniably was not petitioner's supervisor (since all agree that Davis lacked the authority to take tangible employments actions against petitioner). But the record also establishes beyond doubt that Davis was not a supervisor under the broader definition as well.

1. Under the principles set forth above—and as the United States correctly recognizes—Davis lacked any supervisory authority over petitioner that could trigger vicarious liability on the part of Ball State under Title VII for the alleged harassment. U.S. Br. 5-6; 30-32. At the outset, the only timeframe that is conceivably relevant is between 2005 and January 2007, when Davis and petitioner worked together and petitioner's position was part-time. *Supra* at 5-7. That is because petitioner has never argued that—as a catering specialist—Davis had the authority to supervise *full-time* employees. Instead, petitioner's argument is that Davis had the authority to supervise part-time employees. Petitioner was a part-time employee from 2005 through January 2007 (when she was promoted to a full-time position), but the record makes clear that Davis lacked the requisite authority

to control petitioner's daily work activities in a way that materially enabled the alleged harassment.

a. Petitioner bases her argument that Davis is a supervisor for purposes of Title VII on the formal job description for "catering specialist" and the fact that she was occasionally referred to as a "supervisor" by other employees (without elaboration on how they defined that term). A generic job description, however, is not sufficient to establish that Davis actually possessed—much less exercised—supervisory authority that could trigger vicarious liability under Title VII. As the EEOC has explained, supervisory status "is based on ... job function rather than job title" and "must be based on the specific facts." Pet. App. 89a-90a (Enforcement Guidance); *see supra* at 31-32. Petitioner herself concedes that "'nomenclature' matters little" in the face of the "realities of the particular workplace relationship." Pet. Br. 51.

Petitioner attaches particular significance to the fact that the formal "Position Description" for "Catering Specialist" includes within the list of various "Duties" and "Responsibilities": "[l]ead and direct kitchen part-time, substitute, and student employees." JA 12-13. But petitioner overlooks the clause that immediately follows, and thus modifies, "[l]ead and direct"—*viz.*, "via demonstration, coaching, and overseeing their work to promote efficiency and excellence." JA 13. Likewise, the job description's reference to "Positions Supervised" must be read in light of the foregoing reference to "[l]ead[ing] and direct[ing]" part-time employees and substitutes, since that is as close as the job description comes to identifying anything approaching supervisory-type

authority in listing the "Duties" and "Responsibilities" of catering specialists. JA 12, 13.

The fact that more experienced or senior employees in a workplace, or employees with a higher paper rank, may "demonstrate[e]" how to do a task, "coach[]" other employees in accomplishing tasks, or even "oversee[]" work to promote efficiency does not transform them into *supervisors* for purposes of Title VII. Nor would it make a difference if such an employee occasionally asked a fellow co-worker to help with, undertake, or do a task. That sort of a collaborative working arrangement is common in workplaces across America. The fact that more senior employees may interact with co-workers in that way does not mean that they are authorized to *control* the day-to-day activities of their co-workers in a way that could materially enhance any harassment. Likewise, the fact that an employee—whether by virtue of her seniority, title, or skill—may be a "lead person" (JA 66) in a workplace does not mean that she is a *supervisor* for purposes of Title VII. *See* U.S. Br. 30-31 (even if petitioner "occasionally took the lead in the kitchen" or had a "lead role . . . of some sort," that is not enough to trigger vicarious liability).

b. The practical reality of the workplace in which petitioner and Davis worked is that there is no evidence that Davis possessed the requisite supervisory authority over petitioner. Petitioner herself testified that "Kimes has the overall supervision in the kitchen as he often reassigns people to perform different tasks." JA 431. There is no evidence that Davis was authorized to control petitioner's daily activities, no evidence that she had the power to increase petitioner's workload or assign her undesirable tasks, and no evidence that she in fact

purported to do either. *See* U.S. Br. 30 (noting that there is "scant evidence ... that Davis exercised the requisite authority over petitioner's daily work activities"). Despite being deposed and having submitted three sworn affidavits, petitioner has failed to describe a single concrete instance in which Davis actually directed her work. JA 102-248, 415-20, 430-35. And the few details she did give actually cut against the notion that *Davis* controlled her daily activities. *See, e.g.*, JA 431 (stating that "Kimes," not Davis, "controls the schedule" in the kitchen and "reassigns people to perform different tasks").[11]

The record establishes that "daily 'prep sheets'" generally were used to assign the tasks in the kitchen, and that it was the responsibility of the chef (subject to Kimes's oversight) to prepare those lists. Pet. App. 41a-42a, 72a; *see* JA 427, 277-79.[12] Petitioner has never disputed that. Petitioner argues that Davis occasionally *relayed* the prep sheets to her. Pet. Br. 10 (citing JA 74). This contradicts what she told Ball State officials investigating her complaint in November 2005. JA 66 (noting petitioner's insistence that Davis did *not* give her prep sheets). In any event,

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[11] With respect to her retaliation claim (which petitioner has not pressed here), petitioner *did* assert that she was assigned "tasks in the kitchen that were menial and less significant compared to her prior duties" (*e.g.*, "cutting vegetables" instead of "baking"). Pet. App. 70a-72a. But, tellingly, those assignments were made by the chef or Kimes—not Davis. *Id.* at 72a-73a; *see also* Pet. Dist. Ct. Br. 7 (alleging that Kimes provided "better job assignments" to another employee than petitioner).

[12] The chef was responsible for filling out prep sheets. JA 427-28; Pet. App. 72a. But Kimes testified that, during the period that UBC was without a chef, he prepared them. JA 293.

as the United States has explained, "someone 'who merely relays other officials' instructions regarding work assignments' does not qualify as a supervisor." U.S. Br. 31 (quoting EEOC Enforcement Guidance).

Even if Davis had sometimes filled out a prep sheet herself (and the record does not identify a single instance in which that occurred), or otherwise directed petitioner's activities in some occasional way, that would not be sufficient to trigger vicarious liability. Indeed, petitioner herself recognizes that under the proper standard "not all powers of oversight or direction ... give rise to vicarious liability—only those that make a difference to the harasser's ability to inflict harm on his victim." Pet. Br. 49; *see also id.* (noting that "[o]ccasional oversight authority ... that added little to a worker's ability to harass others" does not trigger employer liability); *id.* at 48 (same for "incidental power to direct or oversee ... work"). Petitioner had ample opportunity and incentive to *try* to develop evidence that Davis in fact exercised supervisory authority over her, but she failed to do so.

Nor is there any evidence that Davis had any other authority that could have materially enabled the alleged harassment. Davis had no authority to punish or discipline petitioner, no authority to evaluate petitioner, no authority to assign petitioner overtime, no authority to set petitioner's schedule, no authority to require her presence in any given location, no authority to control her work space, and so on. Kimes had that authority. *See* JA 115 (authority to "put [petitioner] in the baking area"), 117 (annual performance reviews), 120 (discipline), 431 (schedule). And petitioner has another problem. She repeatedly claimed (JA 29, 45, 50, 66, 156, 210, 405)—and another

witness confirmed (JA 405)—that Davis and petitioner did not even *speak* to each other during the relevant time period. It is difficult if not impossible to see how Davis could have realistically exercised the requisite authority—much less controlled petitioner's day-to-day activities—without speaking to her directly.

c. Petitioner's own statements about Davis's role bolster the conclusion that Davis lacked the requisite authority to trigger vicarious liability. Although petitioner referred to Davis as a "supervisor" in some complaint forms (JA 28-29, 45), when asked under oath whether Davis was her supervisor, petitioner said "I don't know what she is," JA 197. Petitioner elaborated that "one day she's a supervisor; one day she's not. ... It's inconsistent." *Id.* And when pressed as to whether Davis was her supervisor even "intermittently, once in a while," petitioner said that she was "not sure." JA 198. "Not sure" is hardly how one would respond if an employee in fact had the authority to control her daily activities. Petitioner's uncertainty about whether Davis was a supervisor is even more telling in light of the fact that she listed Kimes—not Davis—as her "Immediate Supervisor" on the complaint that she filled out for the elevator incident, JA 44, and swore in her deposition that Kimes had "overall supervision in the kitchen," JA 431.

These statements are significant because petitioner was in an ideal position to describe the type of authority that Davis exercised. And yet she not only failed to identify any instance in which Davis had increased her workload or assigned her any undesirable tasks, she said that she was "not sure" if Davis was even her supervisor. JA 198. An employee's testimony that a co-worker is a supervisor

is not sufficient in isolation to establish that the co-worker was a supervisor for Title VII purposes because the test focuses on the practical realities of the workplace, and not labels used to refer to positions. Nevertheless, the fact that petitioner failed to identify any supervisory authority actually exercised by Davis means that she could not have been bullied or intimidated by such authority—and that Davis's alleged supervisory status did not play any role in facilitating or enabling the alleged harassment.

That conclusion is bolstered by the fact that petitioner obviously did not hesitate to confront Davis—and tell her "'where to go.'" *Mikels*, 183 F.3d at 334 (quoting *Faragher*, 524 U.S. at 803). The fact that the alleged victim does not exhibit "any sense of special vulnerability or defenselessness deriving from whatever authority" the coworker possessed is a "clincher" in showing that the employee lacked the requisite authority to trigger vicarious liability. *Id.* Petitioner not only was not shy about confronting Davis, her conduct towards Davis caused Davis to complain to Kimes about petitioner. Indeed, Davis was the first to report the elevator incident to Ball State (JA 22-23), in which—according to Davis—petitioner said, "Move bitch ... you are an evil f - - - - bitch." Pet. App. 6a. Petitioner's unabashed willingness to confront Davis bolsters the conclusion that Davis did not possess the requisite supervisory authority to hold Ball State vicariously liable for her conduct.

d. This case also does not remotely present the *Faragher* situation, where the victim lacked on-the-scene access to higher management in the chain-of-command or where the alleged supervisor was the highest authority on-site. *See Faragher*, 524 U.S. at

781-82; *see also Mack*, 326 F.3d at 125 (noting that the harassing employees' status as the senior employee on the work site gave him "a special dominance over other on-site employees, including [the plaintiff], arising out of their remoteness from others with authority to exercise power on behalf of" other supervisors). Kimes—who petitioner herself testified had "overall supervision in the kitchen," JA 431—was on-site and available to petitioner. Petitioner had direct access to Kimes and reported the alleged harassment to him, and Kimes promptly initiated investigations. *See supra* at 7-10. The chef also was present in the kitchen. Petitioner had direct access to both. JA 302-03.[13]

In short, Davis did not possess the supervisory authority necessary to trigger vicarious liability under any agency-law construction of Title VII. That conclusion should not come as a surprise. No circuit court of which we are aware—no matter what test it applied—has held that an employee had supervisory authority in circumstances like those here.[14]

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[13] Earlier in the case (but not in this Court), petitioner pointed to the fact that Davis did not "clock in" as proof that she had supervisory authority. Pet. App. 54a. As the United States has explained, that fact has no bearing on whether Davis was a supervisor. U.S. Br. 32 n.5. And although Davis did not "clock in" (for reasons that had to do with the collective bargaining arrangement), she was still an "hourly employee." JA 368.

[14] Petitioner has overstated Davis's responsibilities and relied on snippets of documents taken out of context in arguing that summary judgment is not appropriate. *See, e.g.*, Pet. Br. 42-43. But it bears mention that a defendant cannot defeat summary judgment simply by denying or mischaracterizing record evidence, or by relying on conclusory allegations unsupported by

2. The leading cases in the circuits that have followed the EEOC's Enforcement Guidance illustrate the sort of circumstances—simply absent here—that can justify a finding of supervisory authority. They underscore that Davis lacked the necessary supervisory authority to trigger vicarious liability.

a. The seminal Second Circuit case is *Mack v. Otis Elevator Company*. The plaintiff there (Mack) alleged that the "mechanic in charge" (Connolly) had harassed her from the day she started on the job. *Mack*, 326 F.3d at 120. The evidence showed that "the mechanic in charge ha[d] 'the right to assign and schedule work,'" and that Connolly "direct[ed] the particulars of each of Mack's work days, including her work assignments." *Id.* at 120, 125. In addition, Connolly "was the senior employee on the work site"; "[t]here was no one superior to Connolly [at the work site] whose continuing presence might have acted as a check on Connolly's coercive misbehavior toward" Mack. *Id.* at 125. In these circumstances, Connolly plainly "possessed a special dominance over the other on-site employees." *Id.* Thus, the Second Circuit concluded that the harassing employee was a "supervisor for purposes of Title VII analysis." *Id.* at 125, 126.

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the record. *See, e.g., Bellard v. Gautreaux*, 675 F.3d 454, 460 (5th Cir. 2012) ("Conclusory allegations and unsubstantiated assertions will not satisfy the plaintiff's burden [at summary judgment]."); *Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir. 1998) (same); *Taylor v. Gallagher*, 737 F.2d 134, 137 (1st Cir. 1984) (a party's "conclusory mischaracterizations" do "not suffice to raise genuine issues of material fact"). If the record in this case is sufficient to create a triable issue on whether Davis was a supervisor, then it will be virtually impossible for courts to resolve the status of contested employees at summary judgment.

b. *Whitten v. Fred's, Inc.*—a leading Fourth Circuit decision—is to the same effect. In that case, the harassing employee (Green) was the "store manager" and the plaintiff (Whitten) was an "assistant manager." *Whitten*, 601 F.3d at 236. The evidence showed that Green "directed Whitten's activities, giving her a list of tasks he expected her to accomplish"; that he "controlled Whitten's schedule"; and that he "possessed and actually exercised the authority to discipline Whitten by giving her undesirable assignments and work schedules." *Id.* at 246; *see id.* ("Unlike a mere co-worker, Green could change Whitten's schedule and impose unpleasant duties on a whim," and "he in fact did so, making her stay late to clean the store and directing her to work on a Sunday that was supposed to be her day off"). Green, in other words, clearly had the authority to control—and coerce—Whitten's daily activities. It is not surprising, then, that the Fourth Circuit concluded that the fact that Green lacked "the authority to take tangible employment action" against Whitten did not mean that "Green was merely her co-worker." *Id.* at 244-45.

The Fourth Circuit's decision in *Mikels v. City of Durham* is also instructive. There, a police officer (Mikels) alleged that a fellow squad member (Acker) harassed her. *Mikels*, 183 F.3d at 326. The court rejected the argument that Acker possessed the supervisory authority needed to trigger vicarious liability. As the court explained, although Acker was "superior" to Mikels in rank—he was a "corporal" and she was a "private"—"any authority possessed by Acker over Mikels was at best minimal." *Id.* at 334. "At most," Acker's rank gave him "occasional authority to direct her operational conduct while on

duty." *Id.* Moreover, Mikels had "immediate access" to her "direct 'supervisor'" (Sergeant Cox) and therefore "was not isolated from the continuing protective power of higher management." *Id.* In short, Mikels did not experience any "special vulnerability or defenselessness deriving from whatever authority" Acker possessed over her. *Id.* And the "clincher" in that regard, the court held, was the fact that Mikels responded to Acker's "unwelcome conduct" by "rebuff[ing] him in an obscenity and profanity-laced outburst." *Id.*

c. Petitioner holds out *Joens v. John Morrell & Co.*, 354 F.3d 938 (8th Cir. 2004), as her lead example of a case where a harassing employee *lacked* sufficient authority to trigger vicarious liability, in an effort to suggest that her proposed test is not limitless. Pet. Br. 50-51. We agree that the *Joens* decision is instructive. But that case only further bolsters the conclusion that Davis was not a "supervisor," because the alleged harasser in *Joens* if anything had more authority over the plaintiff than Davis had over petitioner here.

The plaintiff in *Joens* was employed during the day shift in the "box shop" at a meat packing plant. 354 F.3d at 939. The harassing employee (Johnson) was the "day shift foreman." *Id.* The record established that Johnson could—and did—demand that the victim (Joens) "make more boxes" and that he was authorized to "write her up for ... failing to perform her work." *Id.* at 940-41; *see* Br. for Appellant at 22-23, 27, *Joens v. John Morrell & Co.*, No. 03-1573 (8th Cir. May 12, 2003) (discussing evidence showing that Johnson "had the ability to direct Joens[']s day-to-day work activities," "could increase Joens[']s workload by increasing the work performed on the box shift," and

had authority to "write-up[]" Joens "for violating company polices or failing to work appropriately"). Yet the Eighth Circuit held that Johnson lacked the requisite "supervisory authority" to trigger vicarious liability. *Joens*, 354 F.3d at 941.

Petitioner argues that the Eighth Circuit was correct to find—on summary judgment—that there was "no implicit threat" based on the circumstances in *Joens*, and that the "workplace contact" in that case was "on terms indistinguishable from that with a co-worker." Pet. Br. 51. As discussed, unlike in *Joens*, here there is no evidence that Davis could increase petitioner's work load or that Davis could write-up petitioner for anything. In short, Davis lacked the authority exercised by the harasser in *Joens*—who petitioner apparently agrees was *not* a supervisor.

E. The Judgment Of The Court Of Appeals Should Be Affirmed

Because it is clear that Davis lacked the supervisory authority needed to trigger vicarious liability, the judgment below should be affirmed—and a remand is neither necessary nor advisable.

Petitioner points out that when this Court concludes that a lower court applied the wrong legal standard, it often remands for application of the correct standard. Pet. Br. 44-45. But this is by no means the only course this Court follows. To the contrary, the Court frequently announces and goes on to apply new legal standards in cases—like this one—where the record is developed and applying the standard would provide needed guidance or dispose of a case that obviously should not proceed any further. Indeed, the Court did just that in *Faragher*, when it

announced the affirmative defense to supervisor liability, yet concluded—based on its own independent analysis of the factual record—that the City of Boca Raton could not prevail on that defense as a matter of law. *See Faragher*, 524 U.S. at 808-09.[15]

Petitioner had ample opportunity to develop the record in this case to support her argument that Davis was her supervisor. *See* U.S. Br. 30. The parties engaged in extensive discovery, and petitioner attempted to make the case that Davis was a supervisor—despite lacking the authority to take tangible employment actions. *See, e.g.*, Pet. Dist. Ct. Br. 17 (arguing Davis was supervisor based on her alleged authority over part-time employees, her job description, and fact that she did not "clock in"); Pet. CA7 Reply Br. 5 (relying on Kimes's testimony, Davis's alleged "supervisory privileges," and Ball State's staff directory). Her briefs below never even acknowledged the Seventh Circuit standard. Instead, she argued that Davis was her supervisor based on the

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[15] *See also, e.g., Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2071 (2011) (announcing new standard and directly applying standard to affirm jury verdict); *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2722 (2010) (announcing and directly applying new interpretation of statute to facts of case); *Ricci v. DeStefano*, 557 U.S. 557, 585-86 (2009) (announcing and directly applying new standard of review to facts of case); *Yates v. Evatt*, 500 U.S. 391, 407 (1991) (announcing and applying new constitutional test on grounds of "judicial economy"), *overruled on other grounds by Estelle v. McGuire*, 502 U.S. 62 (1991); *McClesky v. Zant*, 499 U.S. 467, 497 (1991) (announcing and directly applying new standard governing "abuse of the writ" doctrine); *Thornburg v. Gingles*, 478 U.S. 30, 78 (1986) (announcing and directly applying new legal standard); *Rhode Island v. Innis*, 446 U.S. 291, 315-16 (1980) (announcing and directly applying new definition of statutory term).

same sort of evidence she would use to satisfy the standards for supervisory liability endorsed by the EEOC Guidance and the Second and Fourth Circuits. Petitioner is not now entitled to a second bite at the apple so that she can relitigate this case afresh.

That is particularly true because the ample record that does exist affirmatively forecloses petitioner's ability to establish that Davis was a supervisor under the proper standard. After all, petitioner has already testified that she "d[id] not know" and was "not sure" whether Davis was her supervisor. JA 197-98. She recognized that Kimes was her supervisor (JA 108-109) and was the one who "reassign[ed] people to perform different tasks" and who "control[led] the schedule" (JA 431). There is no question that Kimes was readily accessible at the UBC worksite. And the record makes clear that petitioner had no qualms about telling Davis "where to go." *See supra* at 45. In light of these facts, petitioner could not show that Davis had the requisite authority to control her daily activities—still less prove that such authority actually made her more vulnerable to the alleged harassment.

Moreover, applying the test that the Court adopts to the record facts would provide highly beneficial guidance to the lower courts. A decision illustrating *how* the proper standard should be applied in this case—and definitively holding that Davis is *not* a supervisor for purposes of Title VII—would provide important clarity to employers, employees, and lower courts. A remand on the existing record would suggest that the standard is more indeterminate than determinate. And uncertainty on drawing the line between supervisors and co-workers would defeat the purpose of limiting vicarious liability by heightening

litigation risks, promoting unjust settlements, and generating expensive trial litigation that would waste both public and private resources. *See generally Ellerth*, 524 U.S. at 773-74 (Thomas, J., dissenting) (highlighting consequences associated with unclear and overly broad standard of vicarious liability).

It is also important for this Court not only to establish meaningful limits on supervisory liability, but to demonstrate that those limits have teeth. As discussed above, the facts of this case—and the absence of virtually any evidence that Davis possessed supervisory authority over petitioner under any test—make it an outlier. *See supra* at 39-46. Even if this Court attempts to lay down meaningful limits on who is a supervisor, a remand on the record here almost certainly would send the opposite signal—that the test is virtually limitless. There undoubtedly will be close calls in deciding whether an employee is a supervisor for purposes of Title VII on the spectrum between the lifeguards in *Faragher* and an employee who exercises no supervisory authority at all. But this case is at the latter extreme—and far beyond the realm of close calls. Remanding on these facts could not help but signal to the lower courts that this Court has set an extremely low bar for triggering vicarious liability based on employee harassment, or that the Court's standard is so subtle and amorphous that it does not lend itself to straightforward application to the facts.

Finally, a decision not only announcing a clear standard but applying it to affirm the judgment below would provide welcome notice to employees and employers about their respective rights and responsibilities under Title VII. Such notice would

directly further the framework established by this Court for hostile-work-environment cases.[16]

* * * * *

Judge Wood, in her opinion for the court of appeals, aptly summarized why the Title VII claim in this case fails: although UBC was "undoubtedly an unpleasant place for [petitioner] between 2005 and 2007," the record shows that "Ball State promptly investigated each complaint that she filed, calibrating its response to the results of the investigation and the severity of the alleged conduct." Pet. App. 19a. The only issue before this Court is whether the Seventh Circuit properly concluded that Davis was not a supervisor for purposes of Title VII. It did. There is, accordingly, no basis to allow this lawsuit to proceed any further.

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[16] Petitioner suggests that Federal Rule of Civil Procedure 56(f) prevents this Court from affirming the judgment below. Pet. Br. 45 n.10 That is incorrect. Rule 56(f) authorizes a district court to grant summary judgment "on grounds *not* raised by a party." Fed. R. Civ. P. 56(f)(2) (emphasis added). But in any event, Ball State has always argued that Davis is not a supervisor. And there is nothing that prevents this Court from applying the proper legal test to the record facts and affirming the judgment below.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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REPLY BRIEF

RECORD
AND
BRIEFS

No. 11-556

In the Supreme Court of the United States

MAETTA VANCE,

Petitioner,

v.

BALL STATE UNIVERSITY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In its brief, Ball State University (BSU) recognizes that the rule of law it urged and prevailed on below, which limits vicarious liability under *Faragher* and *Ellerth* to those supervisors who can take tangible employment actions against those they harass, cannot stand. See Resp. Br. 1, 15, 16, 27, 28. It further concedes—repeatedly—that vicarious liability "may be triggered when the harassing employee has the authority to control the victim's daily work activities." *Id.* at 1-2; see also, *e.g.*, *id.* at 15, 19, 24, 26, 27, 28. And it recognizes that "[t]he test for supervisory authority is *always* met when an employee has the power to * * * *recommend* tangible employment actions against the victim," *id.* at 25 (emphasis added), in flat disagreement with Seventh and Eighth Circuit precedent, which hold that such power is never sufficient.

BSU's brief does not merely disavow the Seventh Circuit's rule, but affirmatively discredits it. That rule cannot stand, BSU explains, because it is unwarranted "[u]nder the agency principles that this Court has held govern Title VII vicarious liability," Resp. Br. 1, is "difficult to square" with *Faragher*, *ibid.*, and with "strong[] sugges[tions]" in this Court's other precedents, *id.* at 26; and is at odds with the "common sense meaning of 'supervisor,'" *ibid.*

Indeed, BSU not only recognizes the deficiencies of the Seventh Circuit's rule, but also announces its agreement with petitioner (and the United States) as to "the basic standard for supervisory status," Resp. Br. 31, which it describes as whether the harasser's

employer-given authority over the victim "materially enables the harassment," *e.g.*, *id.* at 2, 15, 16, 19, 24; cf. Pet. Br. 45-46 (urging adoption of Second Circuit's "enables or materially augments" standard). Given these developments, the course for this Court is well-marked: to answer the question presented by rejecting the Seventh Circuit's spurious rule and then to remand for the courts below to apply the correct standard.

But BSU proposes something quite different. Lest lower courts receive the wrong "signal," Resp. Br. 53, it would have this Court comb through the summary judgment record and itself attempt to apply the correct legal standard to the facts. BSU also qualifies its agreement on the governing standard by enumerating a list of "limiting principles" or "guideposts," *id.* at 31, that it insists the Court must announce to keep vicarious liability within "meaningful" bounds, provide necessary "clarity," and "vindicat[e]" the "fundamental" rules established in its prior precedents, *id.* at 38.

This Court should rebuff these requests. There is no need for this Court either to engage in extrajudicial signaling or to arbitrarily restrict the "enables or materially augments" standard for supervisory liability. The "limiting principles" BSU presses are hardly principled; they are certainly not supported (and in important respects are refuted) by precedent and agency law; and they are obviously reverse-engineered to ease the way for respondent's plea for a Supreme-Court-level summary judgment proceeding in this one case.

I. Respondent's Five Guideposts All Point In The Wrong Direction

BSU's "limiting principles" share two features. First, none is a limiting *principle* rooted in existing case law and necessary to clarify the correct legal standard. Some involve unexceptionally relevant *considerations*; some are logical inversions of valid propositions; and some would produce precisely the kind of uncertainty that BSU claims must be avoided. Second, each, like the gun that hangs on the wall in a play's first act, makes a suspiciously timely and useful reappearance in BSU's final summary judgment argument. The need they are said to serve, moreover, is illusory. The danger that employers will be held automatically liable for all employees' (or even all supervisors') actionable harassment was foreclosed by *Ellerth* and *Faragher*'s recognition of an affirmative defense. See pp. 13-14, *infra*.

1. BSU's first guidepost states that the "supervisory inquiry turns on a careful consideration of the facts and realities of the situation, not on titles, formal job descriptions, or labels." Resp. Br. 31. Petitioner agrees that "titles" and "labels" should not be determinative. A harassing "team leader" may have genuine authority over his victim in one workplace, but not in another, and a "supervisor" is not always his *victim's* supervisor. But it is notable that the EEOC Guidance says nothing disparaging about "job descriptions," as opposed to "titles" and "labels," Equal Emp't Opportunity Comm'n, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (1999), 1999 WL 33305874, and it is hard not to see this "principle" as anything other than an attempt on

BSU's part to blunt the clear implication of its own job descriptions: that Davis supervised Vance. After all, BSU's description of Davis's position, "Catering Specialist," (1) lists under "[p]ositions [s]upervised" the roles of "Kitchen Assistants and Substitutes," which included Vance's job position from 2007 until 2009; (2) states that the "[p]osition [f]unction * * * requires leadership of * * * part-time, substitute, and student employees," which covers Vance's position before 2007; and (3) specifically lists "[l]ead[ing] and direct[ing these same] part-time, substitute, and student employee[s]" among Davis's "[d]uties/[r]esponsibilities." J.A. 12-13. The "[p]osition [d]escription" also notes, moreover, that it indicates only some examples of the position's supervisorial authority, not its full reach. J.A. 12 ("This description * * * indicate[s] the kinds of duties * * * required [and] is not intended to limit the right of any supervisor to assign, direct and control the work of an employee under his/her supervision.") (italics omitted).

Job descriptions, unlike labels or titles, are highly probative of one employee's actual authority over another. See, *e.g.*, Chamber of Commerce of the United States of America Amicus Br. 21 (Chamber Amicus Br.). They are written by employers to provide exactly "the kind of clarity" that BSU and its amici insist is "necessary to put employers and employees on notice of their legal rights and obligations." Resp. Br. 38; see also Chamber Amicus Br. 6-7.

2. BSU's second "limiting principle" would *require* that "an employee's authority to control the victim's daily work activities * * * include the power either to

materially increase the victim's workload, or to assign the victim truly undesirable tasks." Resp. Br. 32. Here too the "lower court case law" that BSU cites, Resp. Br. 16, recognizes these as relevant *considerations* in making supervisor determinations, but not criteria for exclusion. *Mack* v. *Otis Elevator Corp.*, 326 F.3d 116 (2d Cir. 2003), for example, did not, as BSU asserts, Resp. Br. 33, "require[]" these particular powers, but rather indicated that supervisory liability would apply (notwithstanding the lack of hiring or firing power) "*if*" they were present, *Mack*, 326 F.3d at 126-127 (emphasis added) (quoting *Dinkins* v. *Charoen Pokphand USA, Inc.*, 133 F. Supp. 2d 1254, 1266 (M.D. Ala. 2001)). Indeed, the very same sentence indicates that "authority to 'affect [the victim's] daily work activities'" would also suffice. *Ibid.* (quotation omitted).

Were this "guidepost" part of the rule, it would exclude many situations where one employee's authority over another enables or materially augments harassment. As the Fourth Circuit recognized in *Whitten* v. *Fred's, Inc.*, 601 F.3d 231, 246 (4th Cir. 2010), for example, the power to set a subordinate's schedule should weigh heavily in determining someone's supervisory status. "Unlike a mere co-worker," the court noted,

> [the harasser] could change [the victim's] schedule * * * on a whim. And he in fact did so, making her stay late * * * and directing her to work on a Sunday that was supposed to be her day off. [He] therefore had power and authority that made [her] vulnerable to his conduct in ways that comparable conduct by a mere co-worker would

> not. [His] authority over [her] thus aided his harassment and enabled him to create a hostile working environment.

Ibid. (internal quotation marks and citations omitted). This "guidepost" would also exclude situations where a supervisor has the power to control the physical location of another employee, enabling him to subject her to abuse without worry that others would notice or interfere, cf. *id.* at 236 (describing power of supervisor to "call[victim] into the storeroom in the back of the store"), or to humiliate her, see *EEOC* v. *CRST Van Expedited, Inc.*, 679 F.3d 657, 687-688 (8th Cir. 2012) (describing power of lead truck driver to determine that trainee must urinate in a public parking lot rather than in a bathroom at a truck rest stop).

3. BSU's next "principle" holds that an "employer is not liable when the victim is unaware of a supervisor's authority to control her daily activities." Resp. Br. 35. This is less a response to any real-world need for "clarification" and more a ham-fisted attempt to set the scene for BSU's later use of Vance's statement, misleadingly wrenched from its context in the record, that she did not "know" when Davis was a "supervisor," see pp. 21-22, *infra*. But as an abstract proposition, it is almost surely wrong. First, agency law principles treat actual and apparent authority as *alternative* grounds for imputing responsibility. Either is sufficient and neither is necessary. See 2 Restatement (Third) of Agency § 703 (2006). And in the real world, a supervisor who knows he has employer-conferred authority over a subordinate may well be emboldened in his harassment whether or not the victim is aware (or certain) of his power. Indeed,

this "principle" would seem to apply equally to harassers with unknown or incompletely understood powers to take tangible employment actions and would thus license defendants to fish for evidence of a victim's subjective understandings even under the Seventh Circuit's rule, thereby destroying the ex ante clarity that respondent and amici protest is essential.

Respondent buries in the same section of its brief an unrelated argument that a victim's "willingness to resist can establish that the harasser's authority did not materially enable the harassment." Resp. Br. 36. Unlike its other "principles," this one *can* claim support in the one lower court decision cited, *Mikels* v. *City of Durham*, 183 F.3d 323, 333 (4th Cir. 1999), but it is an approach especially deserving of this Court's rejection. It would make the "supervisor" determination depend on the sturdiness and courage of the individual victim. It would not only sacrifice respondent and its amici's purportedly cardinal virtue of ex ante clarity but would also violate the principles of *Ellerth* and *Faragher* by placing victims in a Catch-22. Victims who resist by formally complaining would, under BSU's logic, undercut any argument that their harassers were their supervisors. Yet, if they did not officially complain, the employer could escape liability by asserting the *Ellerth/Faragher* affirmative defense.

4. BSU's next guidepost would make "the extent to which the victim has on-the-scene access to her chain-of-command or whether the alleged harasser is the highest-ranking employee on-site" a "key factor" in determining whether the harasser is her supervisor. Resp. Br. 37. Stated as a "factor," this is unexceptionable and, in fact, supports Vance's claim.

The division head's absence from the kitchen, see J.A. 51, 78, and prolonged vacancies in the Chef and Catering Specialist positions, see J.A. 78, made Davis more threatening. Cf. *Mack*, 326 F.3d at 125 (recognizing that the harasser's authority over his target was augmented by the absence of a more senior employee). Stated as a prerequisite, however, as BSU suggests it, this guidepost is surely wrong. In *Pennsylvania State Police* v. *Suders*, 542 U.S. 129 (2004), for example, this Court recognized that Title VII applied supervisory liability standards not only to the actions of the highest-ranking employee on-site, the "Station Commander," but also to those of two lower "supervisors." *Id.* at 134. The lack of on-site recourse may make harassment worse, but on-site availability of higher-ranking supervisors does not mean that lower-level supervisors' powers over their victims do not aid their harassment.

5. BSU's final proposed guidepost, one pressed expansively by its amici, holds that "if an employee is only temporarily authorized to direct the daily work activities of another, the employer is vicariously liable only for unlawful harassment that occurs during that temporary period." Resp. Br. 37 (quoting U.S. Br. 28). Respondent supports its argument in only a single sentence that it deems "obviously" correct: "Supervisory authority that the harasser does not possess when he commits the harassment obviously cannot materially enable that same harassment." *Ibid.*

Pace respondent, that claim is demonstrably false. Supervisory authority that the harasser will enjoy over his victim *in the future* can enable or materially augment his harassment of her in the present. If a

victim knows that another employee can assign her to "clean the toilets," *Faragher*, 524 U.S. at 780, tomorrow, she will fear that employee's power today.

Several of respondent's amici take this nexus argument further still, insisting that vicarious liability should be limited to harassment that was *both* perpetrated by the victim's supervisor *and* "aided by his [supervisory] relationship." See, *e.g.*, Amicus Br. of American Council on Education 18 (arguing that plaintiffs should be required to show the "existence of a nexus between the harasser's authority and the resulting harassment"). Such a rule would have two effects. A company president who repeatedly scribbled a swastika on his Jewish employee's locker would be considered a "co-worker" because a common worker could do the same and a supervisor who had the power to make another employee "clean the toilets for a year," *Faragher*, 524 U.S. at 780, would be considered a "co-worker" so long as he did not make that threat explicit. But *Faragher* expressly rejected "requiring active or affirmative, as distinct from passive or implicit, misuse of supervisory authority," *id.* at 804, in large part because requiring it would destroy the clarity that BSU and its amici insist is so important and make "the temptation to litigate * * * hard to resist," *id.* at 805. "[P]laintiffs and defendants alike," the Court noted, "would be poorly served by an active-use [of authority] rule." *Ibid.* The proper way to accommodate the employer's interests, it held, was *Ellerth*'s affirmative defense. *Id.* at 805-808.

The Court should reject all of BSU's carefully gerrymandered "guideposts." They not only are unnecessary but, in fact, disserve the very interest in

predictability that BSU and its amici assert is "critical." Resp. Br. 38; see, *e.g.*, Chamber Amicus Br. 6.

II. The Seventh Circuit Rule Is, As Both Parties Recognize, Indefensible

While BSU now rejects the rule of law on which it prevailed below, some of its amici argue that the Seventh Circuit's rule is correct. These amici do not grapple with the many legal deficiencies identified in petitioner's opening brief, that of the United States, and, most notably, the brief of respondent. Indeed, their "arguments" are remarkably thin, consisting of (1) a purported demonstration that the Seventh Circuit rule is not "foreclosed" by the holding in *Faragher* and (2) many pages of often facially implausible ipse dixit about the benefits of the clarity the Seventh Circuit's rule would supposedly provide.

A. The Seventh Circuit's Rule Is Irreconcilable With *Faragher* And Other Governing Precedent

1. Rather than contend that this Court's decisions in *Faragher* and *Ellerth* actually *support* the Seventh Circuit's test, the most prominent amicus proponent of that rule, the U.S. Chamber of Commerce, argues a much smaller point: that this Court's disposition in *Faragher*, directing judgment under the newly-formulated supervisor rule for harassment by Silverman, who lacked any power to take tangible employment actions, "does not preclude" the Seventh Circuit rule because the employer in that case did not dispute that Silverman was a "supervisor." Chamber Amicus Br. 17.

That proposition is, on its own narrow terms, somewhat arresting. According to the Chamber, this Court would have granted judgment to the City of Boca Raton on the issue of its vicarious liability for Silverman's harassment if only it had claimed Silverman was not a "supervisor."

That argument has no merit. The question whether the actions of Silverman and Terry gave rise to employer liability, that is, whether they were "supervisors" under *Ellerth* and *Faragher*, did not "lurk" in the background of the case, as the chief amicus claims. Chamber Amicus Br. 19. It was full front and center. This Court did not answer the abstract legal question of how to treat harassment by "supervisors" and then assume its rule applied to whomever the parties or lower courts assumed met that description. On the contrary, the Court's opinion made clear that the particular facts of the case were "circumstances under which [the] employer may be held liable under Title VII." *Faragher*, 524 U.S. at 780. The Court set out in precise detail the authority over Ms. Faragher that the employer had given—and not given—each harasser; it developed, explained, and applied its rule with reference to the workplace authority both employees possessed; and it directed judgment against the employer based on these individuals' particular supervisory powers.

The Court's acceptance in *Faragher* that Terry and Silverman were "supervisors" indicates no casualness on its part, but rather confirms that it did not intend "supervisor" to be a narrow term of art. As the facts of that case vividly illustrate, a superior's power to direct a subordinate's daily work activities,

like the power to hire or fire her or set her wages, can enable or materially augment invidious harassment.

2. Regardless whether the *holding* in *Faragher* dooms the Seventh Circuit rule, the *reasoning* of that case, of *Ellerth*, and of subsequent decisions certainly does. As petitioner, respondent, and the United States agree, supervisory liability should extend equally to those who oversee their victims every day and to those who can hire or fire them. Both have employer-conferred power to coerce their subordinates' obedience and deter complaint. And as petitioner has explained, Pet. Br. 34-37, this Court's later decisions in *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53 (2006), and *Staub* v. *Proctor Hosp.*, 131 S. Ct. 1186 (2011), make that even plainer. Actionable harassment by a supervisor who has power to take actions that would "dissuade[his victim] * * * from making or supporting a charge of discrimination," *Burlington N.*, 548 U.S. at 68 (citations omitted), implicates the central concerns of the *Faragher/Ellerth* rule, as does harassment by one who can effectively recommend, but not personally effect, his subordinate's termination, see *Staub*, 131 S. Ct. at 1193.

B. Even "Considered Fresh," There Is No Valid Reason For Adopting The Seventh Circuit's Arbitrary Restriction

Even "consider[ed] fresh," Chamber Amicus Br. 4, there is no reason to adopt the Seventh Circuit's rule and many good reasons to reject it. Amici's attempts to support the rule consist largely of dramatic assertions about the consequences of adopting the Second Circuit's "enable or materially augment" standard. That standard, they argue, will expose

employers to "automatic liability" for "alleged harassment" and "provide employers virtually no guidance" and "little incentive to undertake prevention efforts." *Id.* at 3, 20. By contrast, the Seventh Circuit rule, they insist, will enable employers to "identify" precisely that subset of supervisors whose harassment would trigger vicarious liability and thus permit employers to direct scarce "screening, training, and monitoring" to "where they will do the most good." *Id.* at 5, 10.

1. Many of these claims are implausible and illogical on their face and none has any empirical support. Respondent's amici offer no evidence that what they insist *would* happen, were the Seventh Circuit rule rejected, actually *has* happened in the many years the EEOC Guidance and Second Circuit rule have been in place. They cite no evidence that Title VII hostile environment cases have flooded district courts in the Second Circuit; that litigation there has been more complex than in the Seventh Circuit; or that employers' prevention efforts are less effective there. And amici identify no actual Second Circuit decision that illustrates the many vices they claim attend the Second Circuit rule. No employer has, in fact, sought this Court's review of a Second Circuit decision since *Mack*, 326 F.3d 116, cert. denied, 540 U.S. 1016 (2003).

The reasons why respondent can offer no evidence or case support are many. First, because employer responsibility is only one element of a hostile environment claim, even adopting the most employee-friendly "supervisor" rule would not induce plaintiffs to file frivolous suits. Second, *Ellerth* and *Faragher*'s affirmative defense provides employers

great protection. To avoid liability for harassment by a supervisor who took no tangible employment actions against his victim, the employer need show only "(a) that [it] exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. Third, the Seventh Circuit rule lacks many of the virtues respondent's amici attribute to it. In particular, it hardly streamlines litigation. As the Chamber itself recognizes, in cases where the harasser is deemed a "co-worker" rather than a "supervisor," courts must "proceed to determine whether the plaintiff has proven the employer's negligence." Chamber Amicus Br. 14. That inquiry is more, not less, complex than imputing vicarious liability.

2. The Chamber's only real argument in favor of the Seventh Circuit rule is that its "bright-line * * * provid[es] employers with clear guidance as to who wields the power that, if abused, may subject employers to automatic liability [and thereby gives employers] more incentive to screen, train, and monitor those employees, and to do so effectively." Chamber Amicus Br. 3. That argument, however, cannot withstand scrutiny. First, it defies common sense that a standard making it *harder* for victims to recover for actionable harassment by those who wield power over them would provide employers with a *greater* "incentive" to take care that those with employer-conferred power wield it appropriately.

Second, the Seventh Circuit rule does not provide the "bright-line" clarity that respondent's amici believe it does. The Seventh Circuit has noted that under its rule the negligence standard "implicitly impose[s] on the employer a higher duty of care to protect its employees against those employees whom the employer has armed with authority, *even if it is less than the authority that triggers the employer's strict liability*" for harassment by a "supervisor." *Doe* v. *Oberweis Dairy*, 456 F.3d 704, 717 (7th Cir. 2006) (emphasis added). "How much greater [care]," it added, "will normally be a jury question." *Ibid.* This ex post jury-determined sliding scale of duty hardly provides the ex ante clarity amici claim for the Seventh Circuit rule.

Third, respondent's amici's argument rests on an unfounded assumption: that the Seventh Circuit rule identifies "those employees most likely to wield, and potentially abuse, the 'official power of the enterprise.'" Chamber Amicus Br. 5 (quoting *Faragher*, 524 U.S. at 762). The reverse is true, in fact. The Seventh Circuit rule identifies only employees who have the power to take tangible employment actions against others. They may work in distant human resources departments and have no day-to-day contact with or even know those below them in the field. On the other hand, the rule excludes those superiors who do have daily contact with their subordinates and can command their presence and retaliate against them through unpleasant assignments or scheduling. Surely the latter, not the former, represent the greater concern. They, after all, have much more opportunity and effective power to harass and are thus "mo[re] likely

to abuse the official power of the enterprise." *Id.* at 10.

Fourth, amici's argument rests on a further unfounded assumption: that the Second Circuit rule would lead to "scattershot compliance measures inevitably * * * less effective than * * * more thorough compliance measures aimed at * * * traditional supervisors." Chamber Amicus Br. 10. They offer no evidence that employer compliance measures in the Seventh Circuit are "more thorough" and less "scattershot" than in the Second. And there is no reason why they should be. Supervisors of any stripe require no extensive, highly specialized training to refrain from harassing their subordinates.

Furthermore, the clarity amici seek would come at some cost. It would lead employers to take action not necessarily to prevent *harassment*, but to prevent *liability*. By reserving the power to take tangible employment actions to individuals in central headquarters, employers could easily insulate themselves from liability for harassment by supervisors in the field. As several Seventh Circuit judges have noted,

> to the extent that employers with multiple worksites vest the managers of such sites with substantial authority and discretion to run them but reserve formal employment authority to a few individuals at central headquarters, our standard may have the practical, if unintended, effect of insulating employers from liability for harassment perpetrated by their managers.

Rhodes v. *Ill. Dept. of Transp.*, 359 F.3d 498, 510 (7th Cir. 2004) (Rovner, J., specially concurring); see

Phelan v. *Cook Cnty.*, 463 F.3d 77, 784 (7th Cir. 2006) (criticizing as "an odd result [that] an employer could escape the possibility of strict liability for supervisor harassment simply by scattering supervisory responsibilities amongst a number of individuals, creating a Title VII supervisory Hydra").

3. It is hard to know what to make of amici's bold claim that the Seventh Circuit rule better reflects "[t]he realities of today's workplace." Chamber Amicus Br. 6. Although judges on the Seventh Circuit itself have applied the rule as a matter of stare decisis, they have criticized it, in fact, for "not comport[ing] with the realities of the workplace." *Rhodes*, 359 F.3d at 510 (Rovner, J., concurring in part and concurring in judgment). And surely any increasing diversity of workplace arrangements, Chamber Amicus Br. 5, would favor a rule that looks to the amount, not the formal type, of power the employer has given the harasser over his victim.

III. This Court Should Remand For Proper Application Of The *Ellerth/Faragher* Rule

Despite conceding that the courts below applied the wrong legal standard, BSU implores this Court to send a "signal" by itself applying the new legal standard to the record developed under the erroneous one. Resp. Br. 53. This Court does not, however, ordinarily apply new legal rules to uncertain facts, scour records, and consider summary judgment motions in the first instance, let alone send "signal[s]." It decides the law, see *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and should reject BSU's request for extrajudicial succor.

When this Court determines that a case was litigated and decided under an incorrect legal standard, it nearly always remands for the lower courts to apply the newly adopted legal standard. See generally *Malat* v. *Riddell*, 383 U.S. 569, 572 (1966) ("Since the courts below applied an incorrect legal standard, we do not consider whether the result would be supportable on the facts of this case had the correct one been applied. * * * [T]he appropriate disposition is to remand the case to the District Court, for fresh fact-findings, addressed to the statute as we have now construed it."); see also, *e.g.*, *Allison Engine Co., Inc.* v. *United States*, 553 U.S. 662, 673 (2008); *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 329 (2007); *Rapanos* v. *United States*, 547 U.S. 715, 757 (2006) (opinion of Scalia, J.); *Johnson* v. *California*, 543 U.S. 499, 515 (2005); *Consol. Rail Corp.* v. *Gottshall*, 512 U.S. 532, 557-558 (1994); *Lucas* v. *S.C. Coastal Council*, 505 U.S. 1003, 1032 (1992); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986); accord U.S. Br. 32 (collecting cases) ("The Court's usual practice * * * is to remand to the lower courts to apply the correct standard as announced by this Court.").

Remanding after adopting a new legal standard is the customary practice for two good reasons: it serves "the ends of justice," *Kelley* v. *S. Pac. Co.*, 419 U.S. 318, 333 (1974) (Stewart, J., concurring in judgment), by ensuring that the parties have a fair opportunity to litigate their case under the correct legal framework, see *Hertz Corp.* v. *Friend*, 130 S. Ct. 1181, 1195 (2010), and it promotes "the efficient allocation of judicial resources," *Kelley*, 419 U.S. at 333. This Court "is a court of final review and not first view," *Zivotofsky* v. *Clinton*, 132 S. Ct. 1421,

1430 (2012) (citation omitted), and "factfinding is the basic responsibility of district courts, rather than appellate courts," *DeMarco* v. *United States*, 415 U.S. 449, 450 n.* (1974) (per curiam). "As a practical matter," moreover, "it is impossible for any member of this Court to make the kind of conscientious and detailed examination of the record that" a district court would. *United States* v. *Hasting*, 461 U.S. 499, 517 (1983) (Stevens, J., concurring in judgment). And, practical considerations aside, it can "insult * * * the Court of Appeals to imply * * * that it cannot be trusted with a task that would normally be conducted on remand." *Ibid.*

Remand is especially appropriate when, as here, the record was developed under an "erroneous view of the law." *Pullman-Standard* v. *Swint*, 456 U.S. 273, 291 (1982); see also *id.* at 300 (Marshall, J., dissenting) ("Having found that the District Court's findings * * * were made under an erroneous view of controlling legal principles, the Court of Appeals was *compelled* to set aside those findings."). Indeed, that rule exists because it is impossible for the reviewing court to be confident that legal error did *not* affect the record in any given case. Remanding leaves such determinations to the courts best positioned to make them and preserves their discretion to permit parties to supplement the record. See *Ellerth*, 524 U.S. at 766 ("On remand, the District Court will have the opportunity to decide whether it would be appropriate to allow Ellerth to amend her pleading or supplement her discovery.").

To be sure, this Court does not lack the *power* to affirm a judgment after rejecting the legal standard on which it was based—or even to do so on a ground

that was not argued or considered below. But instances of it exercising that power are rare and reserved for exceptional circumstances. Respondent's paucity of supporting authority is unsurprising. Fed. R. Civ. P. 56(f) forbids *district courts* from "grant[ing summary judgment] on grounds not raised by a party" without first giving the non-moving party "notice and a reasonable time to respond." Respondent asks this Court, however, to do exactly what the district court itself could not do—to grant summary judgment under a new legal rule when the facts are highly disputed and were not developed under that standard. This Court should not accept its invitation.

Because BSU's original summary judgment brief offered scant argument that Davis was not Vance's supervisor *under even the incorrect legal standard*, remand is particularly appropriate. BSU's opening brief in support of summary judgment is thirty-five pages long. Of those pages, BSU's whole argument that Davis did not supervise Vance consists of a single textual sentence stating that "Saundra Davis is not a supervisor," Defs.' Br. Supp. Summ. J. 30, and a footnote that references the Seventh Circuit's standard, *id.* at 30 n.12. Its reply brief, addressing evidence Vance raised in opposition that Davis did indeed supervise her, concedes that Davis "le[]d and direct[ed] by * * * [o]versight," Defs.' Opp. to Pltf.'s Cross-Mot. for Summ. J. and Reply Br. in Supp. of Mot. for Summ. J. 17 (internal quotation marks omitted) (Defs.' Summ. J. Reply), but argues that "[n]o part of [Davis's job] description includes the power to hire, fire, demote, promote, transfer, or discipline an employee, which are the essential functions of a supervisor as a matter of law," *ibid.*

(citation omitted). The sum total of BSU's argument for summary judgment on this point, in other words, was that Seventh Circuit precedent foreclosed Davis from being considered Vance's supervisor no matter how much day-to-day leading and direction through oversight Davis performed.

BSU's primary argument against remand in this Court rests on five words plucked from petitioner's approximately 23,000-word deposition. See Resp. Br. 52 (arguing that "petitioner has already testified that she '*d[id] not know*' and was '*not sure*' whether Davis was her supervisor") (quoting J.A. 197-198) (emphasis added). When asked during her deposition whether "Saundra Davis is your supervisor," Vance replied "one day she's a supervisor; one day she's not. One day she's to tell people what to do, and one day she's not. It's inconsistent. So I don't know what she is." J.A. 197. When asked further "are you telling me that at times, intermittently, once in a while, she was your supervisor, or she was the supervisor of others or -- I'm not sure what your answer is," she responded "[the employees a]re not sure either." *Id.* at 198. And when asked "You don't know if she was or wasn't your supervisor," she explained "No. Because Bill [Kimes, the division head,] said one day she is and one day she's not." *Ibid.* The context from which BSU wrenches Vance's words reveals that she was trying to respond as carefully and accurately as possible and, in particular, trying to understand what BSU's lawyer meant by the question. She was unsure of what technical nomenclature to apply to Davis for two reasons: (1) because some days Davis would "tell people what to do" and some days she would not (Vance never indicated, moreover, that on those latter occasions Davis did not have *authority* to

"tell people what to do"), and (2) because Kimes, the head of the division, told all employees that Davis was their supervisor on some occasions and not others. Far from indicating uncertainty over whether Davis could and did supervise her, her full testimony indicates that Davis could and often did.

BSU's reliance on this excerpt is not only surprising, but also newfound. It never argued that Vance "'d[id] not know' and was 'not sure' whether Davis was her supervisor," Resp. Br. 52, before either the district court, see Defs.' Br. Supp. Summ. J. 30; Defs.' Summ. J. Reply 17, or the court of appeals, see Resp. C.A. Br. 33.

While it is improper for BSU to ask this Court for summary judgment on a ground not argued below and for petitioner to exhaustively marshal record evidence to oppose it, petitioner would point out that even a cursory examination of the record reveals a "genuine dispute as to * * * material fact," Fed. R. Civ. P. 56(a), that would preclude summary judgment. Consider evidence from just three of the many sources in the present record. First, BSU's own description of Davis's position clearly gave her the power to oversee and direct Vance during the time both served in the kitchen, see p. 4, *supra*, as BSU conceded in the district court, see *id.* at 20; Defs.' Summ. J. Reply 17 (conceding Davis "le[]d and direct[ed Vance] by * * * oversight"). Second, Kimes, the head of Vance and Davis's division, stated (1) that Davis "ha[d] given direction" to Vance, J.A. 67, (2) that he knew that "Davis * * * delegat[ed] jobs to [Vance] in the kitchen," Ball State Internal Documentation Form, Dkt. No. 59-16, at 2, (3) that Davis "direct[ed] and le[]d" other employees in the

kitchen, J.A. 367, and (4) that Davis's status as kitchen management was "complicated" because after Vance filed her complaint he could no longer "have [Davis] directing certain people. I mean, I can't have her directing Maetta [Vance]," *ibid.* In his deposition, Kimes resisted characterizing Davis as a "supervisor" only because he carefully parsed "the difference between directing, leading and supervising," *ibid.*, and believed that Davis did not meet the Seventh Circuit's standard for the last term, *ibid.* ("Supervising is * * * an authority to discipline."). Third, Vance repeatedly described Davis as her supervisor even before she filed her suit. See J.A. 28 (stating that "Davis * * * came back as a supervisor only to start the intimidation again"); *id.* at 45 (listing Davis as a "Kitchen Supervisor"). Such evidence is non-exhaustive but sufficient to preclude summary judgment.

Conclusion

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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SUPPLEMENTAL BRIEF

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MAETTA VANCE,

Petitioner,

v.

BALL STATE UNIVERSITY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

The Solicitor General's brief offers compelling confirmation why this Court needs to settle the question presented, but no convincing reason for withholding review in this case.

The brief affirms that "the question presented is important" and that "the circuits disagree." U.S. Br. 14. The Solicitor General cogently explains that the Seventh Circuit's statutory interpretation "cannot be squared with this Court's * * * specific [holding] in *Faragher*"; is "inconsistent with the EEOC's longstanding enforcement guidance"; and "ignores the practical realities of the workplace and disserves the core purposes of Title VII." *Id.* at 12. He does not deny that the "supervisor" definition supplied the rule of decision in petitioner's case, nor suggest any benefit in permitting this well-developed and much-litigated conflict to percolate further. On the contrary, he recognizes that "the Court's review of the question presented [is] warranted." *Id.* at 17.

The Solicitor General offers only one reason for recommending denial: that this case is not an "appropriate" or "suitable vehicle," *id.*, for addressing the issue, because, he suggests, Vance would likely not prevail on remand under the proper legal standard. This contention lacks merit.

It is not the Court's "normal practice," U.S. Br. 22, to withhold review of a case that satisfies the stringent standards for exercising its discretionary jurisdiction, based on contentions the petitioner ultimately will not prevail, particularly when, as here, the obstacle alleged is one not addressed (or even argued) below. The Court regularly grants

certiorari in such cases – frequently at the Solicitor General's urging.

Equally important, a fair-minded review of the record does not support the Solicitor General's claims about how this case would turn out on remand. Because the Solicitor General, unlike respondent, actually acknowledges the evidence supporting petitioner, his efforts to find a vehicle problem fare worse. He must struggle to deflect and minimize the substantial evidence that Davis directed Vance's daily activities and advance aggressive readings of the EEOC's Guidance and doubtful inferences from ambiguities and alleged gaps in the record. These efforts fail on their own terms, and the larger project is essentially self-defeating. The Solicitor General's granular and case-specific arguments only highlight the extent to which he asks this Court to sit as one of first instance (indeed as fact-finder) and refute claims that this litigation is overly abstract.

I. This Case Is an Entirely Suitable Vehicle for Resolving the Question Presented

The Solicitor General does not allege the type of "vehicle" concern that might actually warrant withholding review of a case. The question is squarely presented: both courts below rejected petitioner's claim that Davis was a supervisor under *Faragher*, relying on the Seventh Circuit's controversial rule, Pet. App. 12a-13a, 53a, and neither decision held or even intimated that petitioner's claim would not withstand summary judgment under the EEOC standard. Respondent did not argue that; in both courts, it rested on circuit precedent, maintaining that evidence of Davis's "duties to 'lead and direct'" were legally insufficient, because "[n]o part of [her job] description include[d]

the power to [take tangible employment actions]," Dkt. 86 (S.J. Reply) at 17; C.A. Br. 32-33 & n.5.

Indeed, this case is, in important respects, an especially *strong* vehicle for resolving the conflict. Unlike many other cases where the question is addressed, the Seventh Circuit's decision raises no other issues that could prevent the Court from reaching it. Compare, *e.g.*, *Joens* v. *John Morrell & Co.*, 354 F.3d 938, 941 (8th Cir. 2004) (affirming summary judgment on alternative ground).[1]

A. This Court's Normal Certiorari Practice Supports Review Here

1. The Solicitor General nonetheless follows respondent in arguing that the Court should not grant review – and settle the entrenched conflict – unless Vance would likely prevail on remand under the correct legal rule.

Although the Solicitor General strains to depict this mode of proceeding as orthodox, it is emphatically not the Court's usual practice to resolve questions not addressed below or to restrict its certiorari jurisdiction to cases where the petitioner would indisputably prevail on application of the correct legal standard.

On the contrary, the Court routinely reviews cases where the "ultimate outcome," *id.* at 21, is uncertain and where it is not "plain[]," *id.* at 22, that

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[1] Because the Title VII hostile environment cause of action includes numerous distinct elements and because unsuccessful "supervisor" claims proceed under the "co-worker" standard, appellate decisions rejecting "supervisor" claims often address, and resolve in employers' favor, other fact-bound issues, making them genuinely unsuitable candidates for review.

the petitioner would prevail once an erroneous legal standard is rejected. See, *e.g.*, *Malat* v. *Riddell*, 383 U.S. 569, 572 (1966); see also *Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430-1431, (2012); *Bond* v. *United States*, 131 S. Ct. 2355, 2367 (2011); *Johnson* v. *California*, 543 U.S. 499, 515 (2005); *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 431 (2001) cf. *Hertz Corp.* v. *Friend*, 130 S. Ct. 1181, 1195 (2010) (expressing doubt respondents could prevail, but remanding "[b]ecause [they] should have a fair opportunity to litigate their case in light of our holding").

2. In reaching back a half century for case support for his claim of "normal practice," see U.S. Br. 22 (citing dismissal in *The Monrosa* v. *Carbon Black Exp., Inc.*, 359 U.S. 180 (1959)), the Solicitor General overleaps much more relevant, contemporary materials. Several times this Term, the United States petitioned (successfully) for certiorari, arguing that the prospect a respondent would ultimately prevail did not counsel against review. In *Match-E-Be-Nash-She-Wish Band* v. *Patchak*, the Solicitor General maintained:

> Whatever the ultimate outcome of the litigation over the particular land acquisition at issue here, [respondent] does not deny that this case would provide a vehicle for the Court to consider important questions concerning the interpretation of [two federal statutes.] * * * The possibility that [respondent] might ultimately be able to [prevail on other grounds] * * * would not prevent the Court from addressing the questions presented in the petition. Indeed, the Court frequently considers cases that have been decided on

> one ground by a court of appeals, leaving other issues to be decided on remand, if necessary.

Cert. Reply, Nos. 11-246, 11-247 at 10; accord Cert. Reply, *Astrue* v. *Capato*, No. 11-159, at 8 (similar).

Similarly, in recommending review in *Freeman* v. *Quicken Loans, Inc.*, No. 10-1042, the Solicitor General urged that the Court reject respondent's contention that review be denied "because the court of appeals could have granted summary judgment to respondent on other grounds," *id.* at 17.

What the Solicitor General explained in *Freeman* applies here: the "alternative argument[]" advanced "would [not] prevent the Court from reaching the question presented," *ibid.*; "neither the court of appeals nor the district court passed upon" whether Ball State should prevail under the EEOC test, *id.* at 19; and that issue is "not logically antecedent to the question presented." *Ibid.* The dissimilarity between this case and *The Monrosa* is also manifest. In that case, there was no dispute that the question before the Court was "not of great importance" *in the parties' litigation*, 359 U.S. at 185 (Harlan, J., dissenting), because "the [plaintiff would] be able to try its claim in the District Court" however the Court ruled. *Id.* at 183. Ms. Vance's interest here is anything but "academic," *id.* at 185; she seeks only to obtain relief in this suit, and that depends on the Court's taking jurisdiction and settling correctly the question presented.

3. The customary reasons for not considering new issues apply with heightened force when they would require this Court to predict findings of fact from a summary judgment record developed under a different and incorrect legal standard. See *Jefferson*

v. *Upton*, 130 S. Ct. 2217, 2223 (2010) (remand is "especially [appropriate] given that the facts * * * are undeveloped"); U.S. Br. at 12, *Sprint/United Mgmt. Co.* v. *Mendelsohn*, 552 U.S. 379 (2008) (No. 06-1221) (proposing that "[r]ather than engaging in a record-intensive de novo review," the Court "should answer the question presented * * * provide some general guidance * * * and [remand] to the district court for a determination * * * under the correct legal standards").

4. The Solicitor General's overwrought concerns that the "Court * * * would be called upon to decide the question presented in the abstract" and be deprived of a "context" in which to "test the merits of the competing standards" are makeweights. U.S. Br. 8. This issue arose in the "[c]ontext of meaningful litigation," and, whatever the ambiguities in the summary judgment record, in a "concrete factual setting." *Ibid.*

Hyperbole aside, as the Solicitor General's brief (and the EEOC Guidance before that) illustrate, the deficiencies in the Seventh Circuit rule – its incompatibility with the holdings and rationales of *Faragher* and *Ellerth* and its thwarting of Title VII's "core purposes" – do not depend on the particular facts in which it is invoked. More generally, when the Court seeks to "understand the[] practical implications" of competing rules of law, U.S. Br. 8, it need not confine itself to the single case before it. Hundreds of lower courts have considered this issue, and the implications and merits of their two starkly different legal rules are well-developed.

B. The Specific Premises Underlying The Solicitor General's Vehicle Argument Are Faulty

There is a more basic problem with the vehicle argument: although the record, developed under the Seventh Circuit rule, is not without ambiguities, it does not support the Solicitor General's confident assertions about what a court of first instance would or should decide here once the erroneous rule is repudiated. The evidence that Davis was a supervisor under the EEOC's test is substantial, not "scant." U.S. Br. 18. Indeed, the evidence the Solicitor General acknowledges – but attempts to quarantine with a "to be sure," Br. 19 – would be sufficient in itself to defeat summary judgment and surely to quell any concern that the proper supervisor rule is "irrelevant" to petitioner's case.

1. First, respondent's official description of Davis's "Catering Specialist" position (Dkt. 75-4) states that she "supervises * * * Kitchen Assistants" and "lead[s] and direct[s]" and "oversee[s] the[] work" of "part-time, substitute, and student employees." *Ibid.*

Second, petitioner consistently identified Davis as her supervisor – before she was represented by counsel or had any appreciation of the legal significance of that characterization. See Dkt. 59-1. (describing Davis as "kitchen supervisor"). In her handwritten complaint to the local NAACP chapter (Dkt. 59-8), Vance explained that "Saundra Davis * * * came back as a supervisor only to start the intimidation again." *Ibid.* She there described Betty Skinner – like Davis, a "Catering Specialist" – as "the other supervisor," while identifying McVicker, another harasser, and others as "co-workers." *Ibid.*

Vance was not alone in this understanding. Donn Knox, who for years worked in the same kitchen, testified that Davis was "some type of supervisor[]" and had been brought "back * * * as a supervisor with Betty Skinner." Dkt. 61-10. When pressed by respondent's counsel what "caused [him] to believe [Davis] was a supervisor," Knox answered, that "Bill Kimes" "told her that she was – [and] told us she was a supervisor," *ibid.*; see also Dkt. 62-3 (testimony of employee Julie Murphy) (describing Davis and Skinner as "[the] supervisors in the kitchen" and testifying that Davis "would give orders").

The Solicitor General's efforts to minimize and deflect this evidence are unavailing – especially given the case's summary judgment posture. He first says it is "unclear," U.S. Br. 19, that Davis's express authority over "*Kitchen* Assistants" and "part-time employees" extended to Vance, a part-time employee, because her title was "*Catering* Assistant." But Ball State made no such semantic argument when Vance pointed to the job description in opposing summary judgment, Dkt. 75-1 at 26 – and whether this is the only possible understanding, it is surely a permissible inference to which a nonmovant is entitled.

The Solicitor General similarly suggests that the Court (or a court adjudicating an actual summary judgment motion) should disregard the evidence that Vance, other employees, and even Kimes described Davis as a "supervisor," pointing to the EEOC's Guidance providing that "job function," rather than "job title," is central. U.S. Br. 20 (citing Pet. App. 89-90a). But Davis's job description uses "supervise[]"– and "oversee," "direct[,] and lead" – as verbs, and the witnesses were not referring to Davis's *title*. The

contention that such evidence "does [not] matter," *id.* at 19, is contrary to the EEOC's expressed understanding. In its recent amicus brief in *Dulaney* v. *Packaging Corp. of Am.*, 673 F.3d 323 (4th Cir. 2012), the EEOC argued that the harasser's "title as 'Lead Person' suggests a level of authority over Dulaney" and emphasized that "[the plaintiff] and her co-workers viewed [him] as a 'supervisor,'" noting that "they all referred to him this way in their depositions." EEOC Br. at 22 (4th Cir. No. 10-2316).

2. It is simply incorrect that "[p]etitioner identifie[d] no specific facts suggesting that Davis directed her day-to-day work." U.S. Br. 20. Internal Ball State documents submitted on summary judgment described Vance ["MV"] as upset that Davis ["SD"] was "now in a place to *lead at work and do things to MV and get away with it*," Dkt. 75-19 (emphasis added), and recorded that Vance was "not comfortable with SD leaving her notes and delegating jobs to her in the kitchen," Dkt 59-16 ("Internal Documentation Form"). Respondent's EEO Compliance officer Gloria Courtright's summary of her meeting with Kimes and Vance recorded that there had been much discussion "about SD's role as a lead person in the kitchen," *ibid.*, and noted that Kimes "reported 'that he knows SD has given direction to MV.'" *Ibid.*

3. The Solicitor General endeavors to deflect this evidence by mining the EEOC Guidance for subprinciples that might be invoked to defeat or disparage petitioner's claim. See, *e.g.*, Br. 18 ("someone who directs only a limited number of tasks or assignments" is not a supervisor); *id.* at 19 (suggesting evidence of Davis's "direction" of Vance "at some unspecified time" would not make her a

"temporary supervisor"). But this effort fails on all fronts.

First, these granular arguments take an improperly grudging – and, in places, inaccurate – view of the evidence and a notably stingier view of the substantive law than when EEOC appears as enforcer or amicus.[2] For example, the Solicitor General offers that Davis "may have handed Vance her prep lists on occasion," U.S. Br. 20, when record evidence indicates she did so "daily," Dkt. 59-16; that Davis "[o]ccasionally took the lead" – despite evidence it was her duty and "role" "to lead," Dkt. 75-4; and that Davis only "relayed instructions" when evidence indicates she "g[a]ve orders." Dkt. 59-16.

And the Solicitor General posits that petitioner could not raise a *triable issue* that she "'reasonably believed' Davis was her supervisor," U.S. Br. 18 (quoting Pet. App. 93a), "even if Davis's * * * job description characterized her as supervising petitioner," *id.* at 19, because Vance testified that "[o]ne day [Davis] told people what to do, and one day she[did] not," *id.* at 18. But the Guidance's

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[2] The adverse inferences the Solicitor General proposes, based, *e.g.*, on what "one would expect petitioner to have recounted" in her deposition, U.S. Br. 18, are neither justified nor fair. Davis's status as a supervisor was hardly a central focus of the district court litigation. Respondent aggressively contested every element of Vance's hostile environment and retaliation claims. Indeed, it principally argued that Vance's harassment claim failed *assuming* Davis was her supervisor, Dkt. 55 at 24, 26, 30, 31; and, rather than disputing the sufficiency of evidence that Davis directed petitioner's work, respondent submitted that such evidence failed under circuit law. Dkt. 86 at 17.

"reasonable belief" principle is meant to apply exactly when "chains of command are unclear." Pet. App. 93a.[3]

These particular shortcomings aside, the Solicitor General's resort to fact-specific contentions about the meaning of sentences in the Guidance or individual documents itself refutes his claims of adherence to "normal" petition-stage practice – and is fatal to the "vehicle" argument in which it appears. That the Solicitor General argues over whether (or not) the "number of tasks" Davis supervised was too "limited," U.S. Br. 18 (quoting Pet. App. 92a), quiets any suggestion that this litigation is insufficiently "concrete" or "meaningful." *Id.* at 8, 21.

II. The Considerations Favoring Review Are Decisive, In Any Event

Even if these questionable "vehicle" reservations had any force, however, the Solicitor General offers no explanation why they deserve controlling weight, as against the considerations strongly supporting review here.

The Solicitor General's brief persuasively documents – but fails to reckon with – the truly

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[3] There is ample evidence that Davis was – because of turnover (a chef was fired, and another Catering Specialist retired) and Kimes's competing responsibilities – frequently the most senior Ball State employee in Vance's workplace. See Dkt. 75-20 (noting need "to place a management person in the kitchen" and that "Betty Skinner, Catering Specialist, did oversee employees in the kitchen but she recently retired"); Dkt. 75-21 (recognizing need for "someone [in the kitchen] who is stronger * * * than the kitchen lead"); cf. *Mack* v. *Otis Elevator Corp.*, 326 F.3d 116, 120 (2d Cir. 2003) (holding that "mechanic in charge" was supervisor because higher-ranking employee "was seldom there").

significant costs of the disposition it recommends. Denying review would perpetuate widespread disuniformity on an important and recurring question of federal law. It would saddle employees (and EEOC as enforcer) in many circuits with a legal rule that, the Solicitor General recognizes, is contrary to this Court's controlling precedents and Title VII's core purposes; frustrates statutory incentives meant "to avoid harm," U.S. Br. 12; and leaves "workers vulnerable to harassment by those with the greatest day-to-day ability to create intolerable working conditions." *Ibid.*

And these costs would persist. As explained in our reply, despite the issue's importance, there is no assurance that other opportunities to correct the Seventh Court's error will soon present themselves, let alone in vehicles as suitable as this one. See Reply Br. 5-6; p. 3, *supra*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AMICUS CURIAE BRIEF

No. 11-556

In the Supreme Court of the United States

MAETTA VANCE, PETITIONER

v.

BALL STATE UNIVERSITY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Whether an employee must have the power to carry out a tangible employment action, such as hiring, firing, promoting, demoting, transferring, or disciplining an employee, in order to qualify as a supervisor for purposes of vicarious employer liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

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INTEREST OF THE UNITED STATES

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits discrimination in employment on various bases. 42 U.S.C. 2000e-2(a). Actionable discrimination includes harassment that creates a hostile working environment. See, *e.g.*, *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 66 (1986); *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998). The Attorney General is responsible for enforcing Title VII against public employers, and the Equal Employment Opportunity Commission (EEOC) enforces Title VII against private employers. 42 U.S.C. 2000e-5(f)(1). In addition, Title VII applies to the United States in its capacity as the nation's largest employer. 42 U.S.C. 2000e-16 (2006 & Supp. IV 2010). The United States thus has a strong interest in the proper interpretation of Title VII. At the

Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. Title VII prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. 42 U.S.C. 2000e-2(a). Employers may be liable for harassment on those bases that creates a hostile working environment. See, *e.g.*, *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 66 (1986); *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998).

The standard for determining an employer's liability for harassment turns on the harasser's status in the workplace. An employer is vicariously liable for a supervisor's harassment. *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 764-765 (1998). If the supervisor took no tangible employment action against the victim, however, the employer may assert as an affirmative defense that it exercised reasonable care to prevent and correct harassment and that the victim unreasonably failed to take advantage of the corrective and preventive opportunities. *Faragher*, 524 U.S. at 789, 807; *Ellerth*, 524 U.S. at 760, 764-765; see *id.* at 761 (defining "tangible employment action" to include "a significant change of employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits"). When the harasser is a co-worker rather than a supervisor, the employer is liable if the victim proves that the employer was negligent because it "knew or should have known about the conduct" but failed to take appropriate action. *Ellerth*, 524 U.S. at 759, 765; see also *Faragher*, 524 U.S. at 799.

The Court has stated that the rule of vicarious liability for a supervisor's harassment applies to a "supervisor with immediate (or successively higher) authority." *Faragher*, 524 U.S. at 807; *Ellerth* 524 U.S. at 765. The Court has not, however, specifically defined which employees qualify as supervisors for purposes of that rule.

2. Petitioner Maetta Vance, who is African-American, began working for respondent Ball State University in 1989 as a substitute server in the Banquet and Catering Division of University Dining Services. She became a part-time catering assistant in 1991. Pet. App. 2a, 27a. Petitioner was involved in several confrontations at work, including racially-charged incidents. *Id.* at 1a-2a. Most relevant here are her altercations with Saundra Davis, a catering specialist who is white. *Id.* at 54a.

a. Sometime before 2002, petitioner and Davis argued, and Davis slapped petitioner on the head. Pet. App. 3a, 18a, 30a n.5. Petitioner told her employer about the incident but did not pursue the matter. *Id.* at 3a. Davis was soon transferred to another department. *Id.* at 3a, 30a n.5.

The conflicts resumed when Davis returned to the Banquet and Catering Division in 2005. Pet. App. 3a. On September 23, 2005, Davis blocked petitioner from exiting an elevator and said, "I'll do it again"—apparently referring to the slapping incident. *Id.* at 3a, 18a, 29a-30a. Petitioner filed an internal complaint describing the incident. *Id.* at 3a-4a. Around the same time, petitioner overheard Davis using the terms "Sambo" and "Buckwheat" while looking at her, but she apparently did not report those comments. *Id.* at 6a, 59a-61a. Petitioner told her supervisors that she was "not comfortable with Saundra Davis leaving her notes and delegating jobs to her in the kitchen." 1:06-cv-01452

Docket entry No. (Docket entry No.) 59-16, at 2 (S.D. Ind. Nov. 1, 2007); J.A. 66-67.

In May 2006, petitioner filed another internal complaint alleging that Davis blocked her way at the elevator, that she was left alone with Davis in the kitchen, and that Davis gave her "weird" looks. Pet. App. 6a-7a, 37a n.8. In response to petitioner's complaints, managers attempted to separate her from Davis. *Id.* at 36a; J.A. 367.

b. During this period, petitioner also had difficulties with others in the department, some of which were racially charged. In September 2005, someone told petitioner that co-worker Connie McVicker had bragged about her family ties to the Ku Klux Klan and had called petitioner a "nigger." Pet. App. 3a, 31a-32a. Petitioner reported the incident, and Bill Kimes, general manager of the Banquet and Catering Division, gave McVicker a written warning, which was atypical for a first offense. *Id.* at 4a-5a, 33a n.6, 34a-35a. A few days later, another supervisor met with McVicker and suggested she consider a transfer. *Id.* at 35a. Petitioner also reported that McVicker had called her a "monkey." *Id.* at 5a, 35a. In December 2005, petitioner filed a complaint with the EEOC alleging, *inter alia*, race discrimination. *Id.* at 6a, 36a.

In 2006, petitioner alleged that Karen Adkins, an assistant personnel director, was "mean mugging" and following petitioner at work. Pet. App. 7a, 37a n.8. Petitioner also filed an internal retaliation complaint against Kimes. *Id.* at 7a, 40a. Respondent investigated the complaints but found no basis for disciplinary action. *Id.* at 37a n.8, 40a-41a. In August 2006, petitioner filed a second complaint with the EEOC, claiming that respondent had retaliated against her by diminishing her

duties, withholding her breaks, denying her overtime, and disciplining her unequally. *Id.* at 7a, 40a.

c. Petitioner filed this suit in October 2006, alleging that she was subjected to a hostile work environment and was retaliated against for complaining about discrimination, in violation of Title VII. Pet. App. 7a, 52a.

In January 2007, respondent promoted petitioner to a full-time catering assistant. Pet. App. 27a, 41a. Petitioner claimed that Davis and others continued to harass her. According to petitioner's complaints, she was consigned to "entry level duties" such as cutting up celery sticks. *Id.* at 43a, 71a. Petitioner further alleged that in August 2007, Davis encountered petitioner at an elevator and said, "Are you scared?" in a southern accent. *Id.* at 38a. Petitioner reported the incident, and Davis received a verbal warning. *Ibid.* Also that month, petitioner filed a grievance about an incident in which McVicker said "payback" as petitioner passed her at the elevator. *Id.* at 37a, 63a. Soon afterwards, McVicker transferred to another job. *Id.* at 36a.

d. On petitioner's various complaint forms, she listed Davis as a "supervisor." J.A. 28-29, 45; Docket entry No. 60-12, at 1. But when asked in a deposition if Davis was her supervisor, petitioner said, "[O]ne day she's a supervisor; one day she's not. * * * It's inconsistent." Pet. App. 54a. Petitioner believed Davis was "part of management because she doesn't clock in." *Ibid.* Another employee said he was unsure of Davis's status, but claimed that Kimes told him Davis was a supervisor. J.A. 385-387. Kimes said Davis's status was "complicated" and explained that Davis did "direct and lead" at times. J.A. 366-367. Davis's job description states that she supervises "[k]itchen [a]ssistants and [s]ubstitutes," and exercises "leadership of up to 20 part-time, substi-

tute, and student employees." J.A. 12. But Kimes also testified that he "c[ould]n't have [Davis] directing [petitioner]" because of problems between them and that he tried to separate them after petitioner complained. J.A. 367. Generally, Kimes or the kitchen chef assigned petitioner's day-to-day tasks. Pet. App. 27a, 41a-42a.

3. The district court granted summary judgment in favor of respondent. Pet. App. 25a-80a.

a. The court concluded that Davis was not petitioner's supervisor and that respondent therefore was not vicariously liable for Davis's conduct. Pet. App. 53a-55a. The court applied Seventh Circuit precedent holding that "[a] supervisor is someone with the power to directly affect the terms and conditions of the plaintiff's employment," *id.* at 53a (citing *Rhodes* v. *Illinois Dep't of Transp.*, 359 F.3d 498, 506 (7th Cir. 2004)), which authority "primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee," *ibid.* (quoting *Hall* v. *Bodine Elec. Co.*, 276 F.3d 345, 355 (7th Cir. 2002)). Accordingly, the court ruled, even assuming "Davis periodically had authority to direct the work of other employees, such power would still not be sufficient to establish a supervisory relationship for purposes of Title VII." *Id.* at 54a. The court noted that it was "well established under Seventh Circuit law that '[a]n employee merely having authority to oversee aspects of another employee's job performance does not qualify as a supervisor.'" *Ibid.* (quoting *Rhodes*, 359 F.3d at 506). The court found "nothing in the record indicating that Ms. Davis had the ability to hire, fire, demote, promote, transfer, or discipline [petitioner]." *Ibid.* (internal quotation marks omitted).

b. The court evaluated petitioner's mistreatment by Davis and McVicker under the standard for harassment

by co-workers. Pet. App. 59a-68a. The court determined that most of petitioner's confrontations with Davis had "no racial character or purpose," and that any racial remarks were "not sufficiently severe or pervasive" to support a hostile work environment claim. *Id.* at 59a-60a. The court concluded that McVicker's racial statements did not "rise to the level of actionable harassment." *Id.* at 61a-63a.

The court further concluded that, even if petitioner had suffered severe or pervasive racial harassment by Davis and McVicker, she could not demonstrate a basis for employer liability. Petitioner could not establish that respondent was negligent because respondent had addressed petitioner's complaints in a way "reasonably calculated to foreclose subsequent harassment." Pet. App. 60a-61a, 63a-66a.

c. The court also rejected petitioner's claims against other employees and her claim of unlawful retaliation. Pet. App. 55a-59a, 68a-80a.

4. The court of appeals affirmed. Pet. App. 1a-24a. The court agreed with the district court that Davis was not petitioner's supervisor because Davis lacked the "power to directly affect the terms and conditions of [petitioner's] employment" by hiring, firing, demoting, promoting, transferring, or disciplining her. *Id.* at 12a (quoting *Rhodes*, 359 F.3d at 506) (emphasis omitted). The court observed that it "ha[d] not joined other circuits in holding that the authority to direct an employee's daily activities establishes supervisory status under Title VII." *Id.* at 12a-13a. The court thus held that petitioner's assertion "that Davis had the authority to tell her what to do" failed to raise a triable issue concerning supervisory status. *Id.* at 13a.

Applying the standard for co-worker harassment, the court assumed that McVicker and Davis had created a hostile work environment. Pet. App. 15a. The court concluded, however, that respondent was not negligent because it "promptly investigat[ed] each of [petitioner's] complaints and t[ook] disciplinary action when appropriate." *Ibid.*; see *id.* at 15a-19a. The court also upheld the district court's rejection of petitioner's remaining claims. *Id.* at 13a-14a, 19a-24a.

SUMMARY OF ARGUMENT

A. 1. Title VII imposes liability on employers for the acts of their "agent[s]." 42 U.S.C. 2000e(b). In *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), the Court explained that, under agency principles, an employer can be vicariously liable for harassment by an employee who is a supervisor. That is because a victim of harassment may be reluctant to accept the risks of confronting a harasser who has supervisory authority, and the agency relationship between the employer and the supervisor thus aids the harasser in accomplishing the harassment.

The court of appeals held that a "supervisor" for purposes of *Faragher* and *Ellerth* is confined to persons who have power to take tangible employment actions against the victim, and does not encompass persons who control the victim's day-to-day work activities. That understanding is unduly restrictive. This Court held in *Faragher* that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile work environment created by a supervisor with immediate (or successively higher) authority over the employee." 524 U.S. at 807. An employee who controls work assignments certainly may possess "immediate" and

substantial authority over the victim, notwithstanding a lack of power to take tangible employment actions. Indeed, in *Faragher* itself, the Court concluded that a lifeguard captain who made daily work assignments was a supervisor for purposes of Title VII even though he lacked authority to take tangible employment actions.

Under agency principles as applied in *Faragher* and *Ellerth*, vicarious liability under Title VII extends to harassment by employees with authority to direct the daily work activities of their victims. An employee's reluctance to accept the risks of confronting a superior is not limited to situations in which the harasser has power to take tangible employment actions. It may be equally difficult for the victim to confront a harassing supervisor with authority to direct daily work activities, including the authority to assign particularly undesirable tasks. That was the case in *Faragher*, for instance, where the lifeguard captain threatened the victim that if she did not date him, he would have her "clean the toilets for a year." 529 U.S. at 780. When an employer vests an employee with authority to direct daily work assignments, the harassment is facilitated by the agency relationship and vicarious liability is warranted.

2. Title VII's purpose to avoid harm and to encourage the creation of anti-harassment policies and effective grievance mechanisms further supports the conclusion that Title VII imposes vicarious liability on an employer for harassment by an employee with authority to control the victim's daily work activities. The affirmative defense provided in *Faragher* and *Ellerth*—which allows an employer to avoid liability for supervisor harassment by showing that it exercised reasonable care to prevent and correct harassment and that the plaintiff unreasonably failed to take advantage of those preven-

tative and corrective opportunities—encourages employers to screen supervisors, monitor them, and establish effective training and complaint programs. If employers faced vicarious liability only for the actions of those supervisors with power to take tangible employment actions, employers would have diminished incentives to train and monitor intermediate supervisors. And employees subject to harassment by those with control over day-to-day assignments would have a diminished ability to make use of employer grievance procedures.

Title VII also ensures that victims are compensated for injuries suffered on account of unlawful employment discrimination. Because the employer seeks to profit through its agents, it is appropriate for the employer to bear the costs when those agents abuse their delegated authority to injure others.

B. The court of appeals' approach is also inconsistent with EEOC guidance defining who is a supervisor for purposes of vicarious liability under Title VII. The EEOC's guidance provides that an employee is a supervisor if the employee (a) has authority to undertake or recommend tangible employment actions, or (b) has authority to direct the victim's daily activities. The EEOC thoroughly considered the Court's decisions in *Faragher* and *Ellerth* in formulating its position, the guidance has governed the agency's enforcement actions since 1999, and it is entitled to deference.

C. Under a correct approach that recognizes that an individual with authority to direct daily work activities qualifies as a supervisor, here, Davis would fail to qualify as petitioner's supervisor on the record as it currently stands. There is scant evidence in the record that Davis exercised the requisite authority over petitioner's

daily work activities; and authority to direct a limited number of tasks does not suffice. Although there is evidence that Davis had a supervisory title, a supervisory title does not itself connote the necessary authority to direct day-to-day work assignments.

ARGUMENT

AN EMPLOYEE WHO DIRECTS ANOTHER EMPLOYEE'S DAILY WORK ACTIVITIES BUT CANNOT TAKE TANGIBLE EMPLOYMENT ACTIONS IS A SUPERVISOR FOR PURPOSES OF VICARIOUS LIABILITY UNDER TITLE VII

A. Title VII Imposes Vicarious Liability On Employers For Harassment By An Employee With Authority To Direct The Victim's Daily Work Activities

1. Imposing vicarious liability for harassment by an employee with authority to direct the victim's daily work activities is consistent with agency principles

a. The term "supervisor" does not appear in Title VII, but the statutory text imposes liability on employers for the actions of their "agent[s]." 42 U.S.C. 2000e(b) (defining "employer" to include an agent of the employer); see also *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 791 (1998). Thus, "[i]n express terms, Congress has directed federal courts to interpret Title VII based on agency principles." *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 754 (1998).

Accordingly, in *Faragher* and *Ellerth*, two cases involving allegations of workplace sexual harassment, this Court applied agency principles to determine the scope of an employer's vicarious liability under Title VII. The Court first explained that an employer is liable for "torts committed by an employee within the scope of his or her employment," *Ellerth*, 524 U.S. at 756, but that "sexual harassment by a supervisor" generally falls out-

side the scope of employment because it is not done with a purpose to serve the employer, *id.* at 756-757. The Court concluded, however, that an employer could still be vicariously liable for a supervisor's harassment—notwithstanding that the supervisor is acting outside the scope of his employment—based on a separate agency principle supporting vicarious liability when an employee is "aided in accomplishing the tort by the existence of the agency relation." *Faragher*, 524 U.S. at 801-802 (quoting 1 Restatement (Second) of Agency § 219(2)(d), at 481 (1957)); see also *Ellerth*, 524 U.S. at 759-762.

The Court explained that a supervisor's harassment of a subordinate is aided by the existence of the agency relation because "[t]he agency relationship affords contact with an employee subjected to a supervisor's * * * harassment, and the victim may * * * be reluctant to accept the risks of blowing the whistle on a superior." *Faragher*, 524 U.S. at 803. Contrasting supervisor harassment from harassment by a co-worker, the Court observed: "When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor." *Ibid.* The Court thus held that, under agency principles, "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." *Id.* at 807. When the harassment is committed by a co-worker rather than a supervisor, however, the employer generally may be liable only if negligent. See *Ellerth*, 524 U.S. at 759, 765.

b. The court of appeals held that a "supervisor" for purposes of the various liability rules set forth in *Faragher* and *Ellerth* is confined to persons possessing "power to *directly* affect the terms and conditions of

[the victim's] employment," which the court understood as "primarily consist[ing] of the power to fire, hire, demote, promote, transfer, or discipline an employee." Pet. App. 12a (citations omitted). Under that approach, the court explained, the "the authority to direct an employee's daily activities" is insufficient to establish supervisory status. *Id.* at 13a. That understanding is unduly restrictive.

Nothing in *Faragher* or *Ellerth* suggests that supervisory status is limited to those employees who have authority to "fire, hire, demote, promote, transfer, or discipline an employee," to the exclusion of those with "authority to direct an employee's daily activities." Pet. App. 12a-13a (citation omitted). The decisions state that an employer is subject to vicarious liability for a hostile environment created by "a supervisor with immediate (or successively higher) authority over the employee." *Faragher*, 524 U.S. at 807; see also *Ellerth* 524 U.S. at 765. And a person who controls daily work assignments and schedules certainly may possess "immediate"—and substantial—"authority over the employee," notwithstanding a lack of power to take tangible employment actions.[1] The Court in *Faragher* recognized as much,

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[1] This Court has defined "tangible employment action" to include "a significant change of employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S. at 761. "A tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors." *Id.* at 762. While those sorts of actions affecting an employee's general employment status amount to tangible employment actions, an alteration in an employee's day-to-day work activities or schedule is generally not considered a tangible employment action for these purposes. See EEOC, *Enforcement*

noting that harassment by a supervisor "is aided by the agency relation" because a supervisor's "power to supervise—[which may be] to hire and fire, and *to set work schedules* and pay rates—does not disappear when [the supervisor] chooses to harass through insults and offensive gestures rather than directly with threats of firing or promises of promotion." 524 U.S. at 802-803 (quoting Susan Estrich, *Sex at Work*, 43 Stan. L. Rev. 813, 854 (1991)) (emphasis added). The Court thus acknowledged that the setting of day-to-day work schedules, although not a tangible employment action, may readily be among the powers a supervisor uses to intimidate a subordinate.

The court of appeals' restrictive approach cannot be squared with this Court's resolution of the specific claims in *Faragher*. There, the Court concluded that the employer was vicariously liable for harassment by two employees even though one had no authority to effect tangible employment actions. Lifeguard captain David Silverman was "responsible for making the [employees'] daily assignments, and for supervising their work and fitness training." 524 U.S. at 781, 810. In contrast, Bill Terry, Chief of the Marine Safety Division, had "authority to hire new [employees] (subject to the approval of higher management), to supervise all aspects of [their] work assignments, to engage in counseling, to deliver oral reprimands, and to make a record of any such discipline." *Id.* at 781. The Court upheld vicarious liability for both Silverman's and Terry's actions, explaining that "these supervisors were granted virtually unchecked authority over their subordinates, directly controll[ing]

Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, 8 FEP Manual (BNA) 405:7654 (1999), available at 1999 WL 33305874.

and supervis[ing] all aspects of [Faragher's] day-to-day activities." *Id.* at 808 (internal quotation marks and citation omitted) (brackets in original).

The Court's focus on the power to supervise and control Faragher's "day-to-day activities" necessarily encompasses power over daily assignments, and necessarily applied to Silverman, who was responsible for making the lifeguards' daily assignments. He thus could substantially determine the desirability (or undesirability) of Faragher's daily work experience. Under the court of appeals' restrictive approach, however, Silverman would have merely been considered Faragher's co-worker because he lacked authority to take tangible employment actions against her, even though he controlled her daily assignments.[2]

c. Under this Court's application of agency principles in *Faragher* and *Ellerth*, vicarious liability under Title VII extends to harassment by employees with authority to control the daily work activities of their victims. An employee's "reluctan[ce] to accept the risks of blowing the whistle on a superior," *Faragher*, 524 U.S. at 803, is not confined to situations where the harasser has the power to take tangible employment actions. See *Ellerth*, 524 U.S. at 761. Because an employee with supervisory powers vested by the employer may "implicitly threaten to misuse [those] supervisory powers to deter any re-

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[2] While the question of who is a supervisor was not directly at issue, this Court in *Pennsylvania State Police* v. *Suders*, 542 U.S. 129 (2004), evaluated the respondent's constructive discharge claim under the *Faragher* and *Ellerth* framework for harassment by supervisors, even though the harassers had no authority to take tangible employment actions. See *Suders* v. *Easton*, 325 F.3d 432, 450 n.11 (3d Cir. 2003) (noting that supervisors could not take tangible employment actions but were "responsible for day-to-day supervision").

sistance or complaint," *Faragher*, 524 U.S. at 801, it may be equally difficult for a victim to "walk away or tell the offender where to go" when the harasser, although lacking authority to take tangible employment actions, directs the victim's daily work activities, *id.* at 803. Harassment in that context is aided by the agency relationship for purposes of the vicarious liability rules set forth in *Faragher* and *Ellerth*.

This Court's decision in *Burlington Northern & Santa Fe Railway Co.* v. *White*, 548 U.S. 53 (2006), is instructive in this regard. There, the Court held that Title VII's anti-retaliation provision, 42 U.S.C. 2000e-2(a), encompassed the retaliatory reallocation of job duties within the same position. The Court explained that "[a]lmost every job category involves some responsibilities and duties that are less desirable than others," and "[c]ommon sense suggests that one good way to discourage an employee * * * from bringing discrimination charges would be to insist that she spend more time performing the arduous duties and less time performing those that are easier or more agreeable." 548 U.S. at 70-71. It is equally a matter of common sense that the authority to control an employee's day-to-day work assignments and schedule materially contributes to a person's ability to harass another and materially diminishes the victim's practical ability to resist and respond.

d. A number of reported decisions illustrate how employees with authority to direct the daily work activities of others have used that power to threaten subordinates into tolerating workplace harassment. In *Faragher*, for instance, lifeguard captain Silverman, who had authority to "make [the victim's] daily assignments," 524 U.S. at 781, subjected the victim to various forms of sexual harassment. In addition to tackling the victim, "pantomim-

[ing] an act of oral sex," making "frequent, vulgar references to women and sexual matters," and "comment[ing] on the bodies of female lifeguards," Silverman explicitly wielded his authority to direct the victim's work assignments by telling her, "[d]ate me or clean the toilets for a year." *Id.* at 780, 782. This Court concluded that vicarious liability was appropriate, noting that Silverman "directly controll[ed] and supervis[ed] all aspects of [the victim's] day-to-day activities," and that the victim was "completely isolated from the City's higher management." *Id.* at 808 (internal quotation marks and citations omitted).

Similarly, in *Whitten* v. *Fred's, Inc.*, 601 F.3d 231 (4th Cir. 2010), the plaintiff was sexually harassed by a "store manager," the senior employee on site. *Id.* at 236.[3] The store manager controlled scheduling, and he told the victim that if she wanted long weekends off from work, she needed to "be good to [him] and give [him] what [he] want[ed]." *Ibid.* (internal quotation marks and citation omitted) (brackets in original). After she attempted to ignore the store manager's harassment throughout the work day, he ordered her to stay late and clean the store, and he later revoked her day off. *Ibid.* The court concluded that supervisor liability was appropriate under *Faragher* and *Ellerth* because, "[u]nlike a mere co-worker, [the store manager] could change Whitten's schedule and impose unpleasant duties on a whim," which made the victim "vulnerable to his conduct in ways that comparable conduct by a mere co-worker would not." *Id.* at 246.

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[3] *Whitten* involved only state law claims, but the court applied the *Faragher* and *Ellerth* framework, noting that South Carolina law "essentially follows the substantive strictures of Title VII." 601 F.3d at 242.

In *Mack* v. *Otis Elevator Co.*, 326 F.3d 116 (2d Cir.), cert. denied, 540 U.S. 1016 (2003), the plaintiff, an elevator mechanic's helper, alleged that she was sexually harassed by the "mechanic in charge" of her worksite, James Connolly, who had authority "to assign and schedule work" and to "direct the work force." *Id.* at 120. Connolly referred to the victim on multiple occasions as an "attractive young lady," and told her repeatedly that she had a "fantastic ass," "luscious lips," and "beautiful eyes." *Ibid.* Connolly regularly changed his clothes in front of the plaintiff at the end of his shift, boasted to her about sexual exploits, and on one occasion "grabbed [her] by the waist, pulled her onto his lap, tried to kiss her[,] and touched her buttocks." *Ibid.* When matters grew increasingly tense between the two, Connolly gave the plaintiff very little overtime work and told her that he did not care if she complained about him because "I get away with everything. I always have and I always will." *Id.* at 121. The court concluded that Connolly's authority to direct the plaintiff's workday, in addition to the fact that he was the senior employee on site, clothed him with "special dominance over other on-site employees," and the harassment was therefore aided by Connolly's agency relationship with the employer. *Id.* at 125.

In each of these cases, the employer vested certain employees with authority to direct the daily activities of others, and that power was abused to harass individual subordinates. That harassment was facilitated by the authority vested by the employer, and vicarious liability was therefore warranted under agency principles as applied by this Court in *Faragher* and *Ellerth*.

By contrast, decisions from circuits that have limited supervisor liability to employees with authority to take

tangible employment actions illustrate how that restrictive rule unfairly shields employers from liability when their agents harass victims by abusing delegated authority. In *Rhodes* v. *Illinois Department of Transportation*, 359 F.3d 498 (7th Cir. 2004), for example, the plaintiff was the only female employee during her first two seasons as a highway maintainer. *Id.* at 502. After she complained about a route change, she alleged that the two employees with responsibility for assigning tasks in the work yard called her vulgar names, forced her to wash her truck in sub-zero temperatures, assigned her to work in the yard instead of on road crews, instructed a mechanic not to fix the heat in her truck, and improperly marked her as absent from work when she went to take a licensing test. *Id.* at 501-503. The employer conceded that the plaintiff had been subjected to a hostile work environment, *id.* at 505, but the court concluded that vicarious liability was unwarranted because the harassers had no authority to make economic decisions regarding the victim's employment. *Id.* at 506. In a concurring opinion, Judge Rovner expressed concern that the court's unduly narrow definition of supervisor liability was "troubling * * * in a case like this" and should be reexamined. *Id.* at 509. She explained that, regardless of whether the harassers possessed formal employment authority, "a factfinder reasonably might conclude that the power [the employer] had given them to manage the Yard on a day-to-day basis enabled or facilitated their ability to create a hostile work environment." *Id.* at 510.

In *Weyers* v. *Lear Operations Corp.*, 359 F.3d 1049 (8th Cir. 2004), the plaintiff, who was 43 years old when she was hired, alleged that she was subjected to a hostile work environment by her "team leader," who had au-

thority to assign her daily tasks. *Id.* at 1051-1052. She alleged that the team leader subjected her to constant harassment about her age, including telling her "if you're over 25, you're female, you're out of here. You don't work for me. You don't work in my department." *Id.* at 1052 & n.3, 1057. She also alleged that the team leader used his authority to prohibit her from participating in training opportunities available to other new employees, which she believed contributed to her dismissal. *Id.* at 1057. The court of appeals reversed a jury verdict in the plaintiff's favor, concluding that the employer was not vicariously liable for the harassment because the team leader "himself did not have the power to take tangible employment actions against [the plaintiff]." *Ibid.* The court noted that its "option of adopting the broader * * * definition of supervisor status [had been] foreclosed" by circuit precedent. *Id.* at 1056-1057.

In *EEOC* v. *CRST Van Expedited, Inc.*, 679 F.3d 657 (8th Cir. 2012), various female truck drivers attempting to complete their employer's training program, which involved a 28-day over-the-road training trip with a "Lead Driver" who evaluated the trainee's performance at the end of the trip, alleged that they were subjected to sexual harassment during those trips. *Id.* at 665. One victim alleged that a Lead Driver made constant sexual remarks while giving her instructions, such as telling her "the gear stick is not the penis of [your] husband, [you] don't have to touch the gear stick so often" and "[y]ou got big tits for your size," and that another Lead Driver "forced [her] to have unwanted sex with him on several occasions in order to get a passing grade." *Id.* at 666. Another victim alleged that her Lead Driver repeatedly entered the cab wearing only his underpants and rubbed the back of her head; ordered her to clean

up the truck when she complained about the mess, saying "that's what you're on the truck for, you're my bitch * * * [s]hut up and clean it up"; and that he routinely urinated in bottles and bags in the cabin and ordered her to "shut up and clean it up" when she complained. *Id.* at 688. Despite the Lead Drivers' repeated abuse of authority to harass trainees, the court concluded that, "[a]pplying [circuit] precedent," the employer could not be vicariously liable because it was "undisputed that none of CRST's Lead Drivers wielded any * * * power" to take tangible employment actions against the victims. *Id.* at 684.

e. Determining whether an employee who harassed a subordinate has authority to direct the victim's daily work activities will require evaluation of facts specific to the employment relationship between the harasser and the victim. In Title VII, Congress "directed federal courts to interpret Title VII based on agency principles," *Ellerth*, 524 U.S. at 754, and agency principles require evaluation of specific facts. See 1 Restatement (Third) of Agency § 1.02 (2006) ("Whether a relationship is one of agency is a legal conclusion made after an assessment of the facts of the relationship.").

This Court has recognized the need for a similarly fact-specific approach in other Title VII contexts. "Context matters." *Burlington Northern*, 548 U.S. at 69. For instance, the test for determining whether an employer took a prohibited retaliatory action against an employee under Title VII's antiretaliation provision, 42 U.S.C. 2000e-2(a), depends on whether the challenged action "might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern*, 548 U.S. at 68 (internal quotation marks and citation omitted). In adopting that standard,

the Court acknowledged that "the significance of any given act of retaliation will often depend upon the particular circumstances." *Id.* at 69. To determine whether unlawful harassment has occurred, moreover, the plaintiff must show that harassment was sufficiently severe or pervasive to alter the terms and conditions of his or her employment, and the severity of harassment "should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (internal quotation marks and citation omitted).

In any event, the court of appeals' more restrictive approach does not necessarily offer a bright-line alternative. Whether an employee has authority to take tangible employment actions against a victim may not be clear in an employer's policy documents, and there may be no examples of the alleged harasser taking such actions. As a factual matter, the inquiry into whether an employee possesses authority to direct a subordinate's daily activities may be no more contextual than the inquiry into whether he has authority to take tangible employment actions. In either case, the analysis will turn on consideration of the particularities of the authority possessed by the putative supervisor.

2. Imposing vicarious liability for harassment by an employee with authority to direct the victim's daily work activities is consistent with the objectives of Title VII

Imposing vicarious liability on an employer for harassment by an employee with authority to control the victim's daily work activities not only is consistent with this Court's application of agency principles in *Faragher*

and *Ellerth*, but also is consistent with the objectives of Title VII.

a. The primary object of Title VII is not "to provide redress but to avoid harm." *Faragher*, 524 U.S. at 806 (citing *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417 (1975)); see also *Ellerth*, 524 U.S. at 764 (noting "Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms"). The Court in *Faragher* and *Ellerth* took special care to "adapt agency concepts to the practical objectives of Title VII" by recognizing an affirmative defense through which employers may avoid liability for harm inflicted by supervisors by implementing policies designed to prevent and correct harassment. *Faragher*, 524 U.S. at 802 n.3. The affirmative defense is unavailable in cases in which a tangible employment action is taken. In those circumstances, the "official power of the enterprise" has been brought to bear on the victim, and the "aided by the agency relation" standard is satisfied. *Ellerth*, 524 U.S. at 762-763. But in cases where no tangible employment action is taken, an employer can avoid liability for supervisor harassment by showing that it exercised reasonable care to prevent and correct harassment and that the plaintiff employee unreasonably failed to take advantage of those preventive and corrective opportunities. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 764-765.

The affirmative defense established in *Faragher* and *Ellerth* "accommodates [the avoidable consequences] doctrine by requiring plaintiffs reasonably to stave off avoidable harm." *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 146 (2004) (internal quotation marks and citation omitted). Properly applied, the defense encourages employers to screen supervisors, monitor them,

and establish effective training and complaint programs. *Faragher*, 524 U.S. at 803; *Ellerth*, 524 U.S. at 764-765. The defense thus promotes Title VII's "design[] to encourage the creation of antiharassment policies and effective grievance mechanisms." *Id.* at 764.

If employers face vicarious liability only for the actions of those supervisors with power to take tangible employment actions, employers could attempt to insulate themselves from vicarious liability by confining the authority to effect tangible employment actions to a centralized personnel department. Such a department might be off site, and might have indirect or infrequent contact with potential victims, leaving workers vulnerable to harassment by those with the greatest day-to-day ability to create intolerable working conditions. Cf. *Faragher*, 524 U.S. at 808 (noting that supervisors supervised and controlled "all aspects of [Faragher's] day-to-day activities" and "had virtually unchecked authority," and that "Faragher and her colleagues were completely isolated from the City's higher management") (internal quotation marks omitted).

In that event, employers would have a diminished incentive to train or monitor immediate supervisors. And victims would have a diminished ability and incentive to make use of any available grievance procedures. That arrangement would disserve the core purposes of Title VII. But if supervisory liability were properly considered to encompass the authority to control day-to-day work assignments, employers would lack any comparable ability or incentive to avoid vicarious liability by assigning that authority to a remote, central department: by nature, the assignment of day-to-day activities and schedules generally requires the exercise of on-site discretion and supervision. Employees, moreover, would

be better positioned to take advantage of internal complaint procedures.

This Court recently addressed a similar dynamic in *Staub* v. *Proctor Hospital*, 131 S.Ct. 1186 (2011), a case arising under the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. 4301 *et seq.*, which the Court has recognized "is very similar to Title VII." *Staub*, 131 S. Ct. at 1191. In *Staub*, the employer fired the plaintiff based in part on reports from biased supervisors, including the plaintiff's immediate supervisor and a more senior supervisor. *Id.* at 1189. The Court concluded that the employer could be vicariously liable for the discharge even though an unbiased vice president of human resources took the challenged employment action. Otherwise, the Court explained, an employer could "be effectively shielded from discriminatory acts and recommendations of supervisors" by vesting ultimate authority for personnel decisions in an independent official. *Id.* at 1193. The same considerations counsel in favor of recognizing that an employee with authority to direct day-to-day work activities qualifies as a supervisor for purposes of vicarious employer liability.

b. In addition to promoting deterrence, Title VII provides a means "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co.*, 422 U.S. at 418. Common-law principles hold an employer vicariously liable for the wrongful acts of its agents to promote compensation of victims of wrongful conduct. *Prosser and Keaton on the Law of Torts* 500-501 (W. Page Keeton ed., 5th ed. 1984). The common-law approach rests on the view that, because the employer has sought to profit through its agents, the employer, rather than the innocent victims, should bear the costs when those agents abuse their del-

egated authority to injure others. *Ibid.* Because employers benefit from empowering lower-level supervisors to direct other workers, it is appropriate that they should, subject to the *Faragher* and *Ellerth* defense, be subject to liability for abuse of that power.

B. The EEOC's Longstanding Interpretation Is Reasonable And Entitled To Deference

Shortly after the Court decided *Faragher* and *Ellerth*, the EEOC issued enforcement guidance defining who qualifies as a supervisor for purposes of vicarious employer liability under Title VII. EEOC, *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, 8 FEP Manual (BNA) 405:7654 (1999), available at 1999 WL 33305874 (reproduced at Pet. App. 81a-93a) (EEOC Guidance). The guidance provides that an individual qualifies as a supervisor if:

> a. the individual has authority to undertake or recommend tangible employment decisions affecting the employee; *or*
>
> b. the individual has authority to direct the employee's daily work activities.

Pet. App. 90a (emphasis added). That guidance is "an administrative interpretation of [Title VII] by the enforcing agency," and "constitute[s] a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 65 (1986) (internal quotation marks and citations omitted). The court of appeals initially adopted its narrow construction of supervisor liability without the benefit of the EEOC's guidance. The Court should afford deference to that considered guidance in resolving the question presented.

1. Agency enforcement guidelines are "entitled to respect" when the agency has shown "thoroughness * * * in its consideration" and "validity [in] its reasoning." *Skidmore* v. *Swift Co.*, 323 U.S. 134, 140 (1944); see *Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156-157 (1991). The EEOC's guidance document demonstrates that the EEOC thoroughly considered the issue of supervisory status to formulate a position on the scope of vicarious liability under Title VII. The guidance document is entitled to deference.

To define the scope of supervisor liability under Title VII, the EEOC explained that because vicarious liability for supervisor harassment under *Faragher* and *Ellerth* is grounded in the harasser's potential misuse of delegated authority, "that authority must be of sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment" for vicarious liability to exist. Pet. App. 89a. The EEOC concluded that, when an employee has authority to direct another employee's day-to-day work activities, that person's ability to harass "is enhanced by his or her authority to increase the employee's workload or assign undesirable tasks," and vicarious liability is therefore appropriate. *Id.* at 91a. The EEOC explained that its interpretation was supported by the Court's resolution of the specific claims in *Faragher*, in which the Court concluded that Silverman was a supervisor notwithstanding his lack of authority to take tangible employment actions. *Id.* at 91a-92a.

The EEOC's guidance also recognizes limits on who should qualify as a supervisor by virtue of authority to direct another employee's daily activities. Those limits are directly tied to whether harassment would be "aided by the agency relation" in specific circumstances. The

guidance explains that a determination of supervisor status "is based on [the employee's] job function rather than job title (e.g., 'team leader') and must be based on the specific facts." Pet. App. 89a-90a. Moreover, if an employee is only temporarily authorized to direct the daily work activities of another, the employer is vicariously liable only for unlawful harassment that occurs during that temporary period. *Id.* at 92a. The guidance further clarifies that an employee who "merely relays other officials' instructions regarding work assignments and reports back to those officials does not have true supervisory authority," and harassment in that scenario would not be aided by the agency relationship. *Ibid.* And an employee who directs "only a limited number of tasks or assignments" for another employee likewise would not have sufficient authority to qualify as a supervisor. *Ibid.*

The EEOC's guidance has governed the agency's enforcement actions since 1999, and the EEOC has filed numerous briefs in the courts of appeals setting forth its understanding. See EEOC Br. as Amicus Curiae, *Dulaney* v. *Packaging Corp. of Am.*, 673 F.3d 323 (4th Cir. 2012) (No. 10-2316); EEOC Br., *CRST*, *supra* (Nos. 09-3764, 09-3765, 10-1682); EEOC Pet. for Reh'g and Suggestion for Reh'g En Banc, *CRST*, *supra*; EEOC Br. as Amicus Curiae, *Whitten*, *supra* (No. 09-1265); EEOC Br. as Amicus Curiae, *Weyers*, *supra* (No. 02-3732); EEOC Br. as Amicus Curiae, *Mack*, *supra* (No. 02-7056). The agency's consistent position warrants a measure of deference. See *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1335 (2011) (giving weight to EEOC's consistent position set forth in compliance manual and court of appeals briefs); *Federal Express Corp.* v. *Holowecki*, 552 U.S. 389, 399 (2008) (not-

ing, in deferring to EEOC guidance, that it had "been binding on EEOC staff for at least five years").

2. The court of appeals initially adopted its restrictive view of supervisor liability under Title VII without the benefit of the EEOC's guidance. Shortly after this Court decided *Faragher* and *Ellerth*, the court of appeals held in *Parkins* v. *Civil Constructors of Illinois, Inc.*, 163 F.3d 1027 (7th Cir. 1998), that supervisory authority under those cases "primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee." *Id.* at 1034. The *Parkins* court explained that "[a]bsent an entrustment of at least some of this authority, an employee does not qualify as a supervisor for purposes [of] imputing liability to the employer." *Ibid.* In its decision below, the court of appeals reiterated that holding.

The EEOC issued its guidance shortly after the court of appeals' decision in *Parkins*, and certain judges then called for the court of appeals to reconsider its holding. See *Rhodes*, 359 F.3d at 509 (Rovner, J., concurring in part and concurring in the judgment); *id.* at 510 (Cudahy, J., concurring). The court of appeals, however, has continued to hold that employees who assign tasks and recommend discipline fail to qualify as supervisors. *Id.* at 506; see also *Hall* v. *Bodine Elec. Co.*, 276 F.3d 345, 355 (7th Cir. 2002) (finding no supervisory status where harasser directed work, contributed to evaluations, and trained victim). Consistent with the EEOC's guidance, this Court should reject the court of appeals' unduly restrictive approach and hold that supervisory liability extends to harassment by an employee who has authority to direct the victim's daily work activities.

C. On The Existing Record In This Case, Davis Fails To Qualify As Petitioner's Supervisor

For the reasons explained above, the court of appeals erred in refusing to recognize that supervisor liability under Title VII extends to harassment by employees with authority to direct the day-to-day work activities of their victims. But here, even under the correct legal test, Davis—the only employee whose supervising status is in issue, see Pet. 29—would fail to qualify as petitioner's supervisor on the record as it currently stands.

At the summary judgment phase, the parties engaged in substantial discovery of the facts pertaining to petitioner's claims. There is scant evidence in the resulting record that Davis exercised the requisite authority over petitioner's daily work activities. Petitioner's deposition testimony describes no instances in which Davis actually directed her work. J.A. 102-248. Petitioner now points to indicia in the record of Davis possessing a lead role in the kitchen of some sort, see Pet. Br. 10, 42-43, but there is no evidence describing the nature of any authority over petitioner or whether the authority encompassed control of day-to-day work activities. And petitioner would be required to do more than demonstrate that Davis possessed some minimal level of authority over petitioner, because "someone who directs only a limited number of tasks or assignments would not qualify as a 'supervisor.'" Pet. App. 92a (EEOC Guidance).[4]

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[4] The record also does not demonstrate that petitioner "reasonably believed" Davis was her supervisor. See Pet. App. 92a (EEOC Guidance) (noting that an employer may be vicariously liable "if the employee reasonably believed that the harasser had [supervisory] power," even if that belief is false). When asked whether she considered Davis her supervisor at the time of their confrontation at the elevator in April 2006, petitioner replied: "I don't know what she is." J.A.

Petitioner did refer to Davis as a "supervisor" or "kitchen supervisor" in various complaint forms. J.A. 28-29, 45; Docket entry No. 60-12, at 1. And another employee stated that Kimes had told him Davis was a supervisor. J.A. 385-387. Davis's job description also states that she "lead[s] and direct[s]" "kitchen part-time, substitute, and student employee helpers" and supervises "[k]itchen [a]ssistants and [s]ubstitutes." J.A. 12-13. And Kimes acknowledged that Davis directed employees "[a]t times." J.A. 367.

But even if Davis was labeled a "supervisor" and her job description characterized her as supervising petitioner, that would not suffice. Supervisor status "is based on * * * job function rather than job title" and "must be based on the specific facts." Pet. App. 89a-90a (EEOC Guidance). The record as it stands contains no specific facts demonstrating that Davis directed petitioner's day-to-day work. In fact, the record suggests that either Kimes or the chef outlined petitioner's daily tasks on "prep lists." *Id.* at 41a-42a, 72a. While Davis on occasion may have handed petitioner her prep lists, the record does not show that Davis prepared them. See J.A. 74. And someone "who merely relays other officials' instructions regarding work assignments" does not qualify as a supervisor. Pet. App. 92a (EEOC Guidance). Nor would it be enough for petitioner to show that Davis occasionally took the lead in the kitchen. An employer may be liable where a temporary supervisor "commits unlawful harassment of a subordinate while serving as

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197; see also Pet. App. 54a. Petitioner explained that, "one day she's a supervisor; one day she's not. One day she's to tell people what to do, and one day she's not." *Ibid.* Asked whether Davis was her supervisor even "intermittently, once in a while," petitioner answered that she was "not sure." J.A. 198.

his or her supervisor." *Ibid.* But here, the record contains only oblique references to any exercise of authority by Davis and fails to indicate that the harassment occurred during any such period.[5]

This Court on its own could review the record as it presently stands to determine whether summary judgment was appropriately granted on that record under the correct legal standard. The Court's usual practice, however, is to remand to the lower courts to apply the correct standard as announced by this Court. See, *e.g.*, *Allison Engine Co.* v. *United States ex rel. Sanders*, 553 U.S. 662, 673 (2008); *Sprint/United Mgmt. Co.* v. *Mendelsohn*, 552 U.S. 379, 388 (2008); *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 329 (2007); *Merck KGaA* v. *Integra Lifesciences I, Ltd.*, 545 U.S. 193, 208 (2005). In any remand, the courts below presumably would also have discretion to determine whether it would be appropriate to allow petitioner to amend her pleadings or supplement her discovery to attempt to satisfy the correct standard. See *Ellerth*, 524 U.S. at 766.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings consistent with the Court's decision.

Respectfully submitted.

---

[5] Petitioner's observation that Davis "d[id not] clock in" may indicate that Davis outranked petitioner in the organizational hierarchy, but it does not show that she had authority to direct petitioner's day-to-day activities. Pet. App. 54a; see also *Mikels* v. *City of Durham*, 183 F.3d 323, 334 (4th Cir. 1999) (finding no supervisory status where harasser outranked victim but had "minimal" authority over her).

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SEPTEMBER 2012

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-556

In the Supreme Court of the United States

MAETTA VANCE, *Petitioner*,

v.

BALL STATE UNIVERSITY, *Respondent*.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION AND OTHER HIGHER EDUCATION ORGANIZATIONS IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST[1]

Amicus American Council on Education (ACE) represents all higher education sectors. Its approximately 1,800 members include a substantial majority of colleges and universities in the United States. ACE is the major coordinating body for all of the nation's higher education institutions, and seeks to provide leadership and a unifying voice on higher education issues in order to influence public policy through advocacy, research, and program initiatives.

Because Title VII covers virtually all employers with fifteen or more employees, all institutions of higher education are subject to Title VII. Higher education employers have a significant interest in this Court adopting a principled definition of "supervisor" to address the myriad of employment relationships existing on campuses.

The following additional *amici* have joined in this brief and are described in greater detail in the attached Appendix:

- American Association of Community Colleges;
- American Association of State Colleges and Universities;

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[1] Counsel for *amici* authored this brief in its entirety. Sup. Ct. R. 37.6. No party or counsel for a party authored this brief in whole or in part, or made a monetary contribution to fund the preparation or submission of this brief. *Id.* Petitioner and Respondent have filed blanket consents to the filing of *amicus* briefs in this case. Sup. Ct. R. 37.3.

- Association of Governing Boards of Universities and Colleges;
- Association of Public and Land-grant Universities; and
- Higher Education Council of the Employment Law Alliance.

SUMMARY OF ARGUMENT

Organizing and classifying employees – as supervisors, subordinates, and co-workers – is fundamental to any work environment. Many businesses use defined "chains of command" to direct employee activities. Employment in higher education, however, may involve any number of varying arrangements – often more collaborative and less hierarchical – to organize employee activity. Variability in organizational arrangements in higher education poses significant challenges when attempting to define appropriate limits of vicarious liability for employee intentional misconduct under Title VII.

In accordance with Title VII and this Court's decisions, employers may be held vicariously liable for intentional acts of harassment committed by employees "outside of the scope of employment" consistent with agency principles. Those principles provide that employers may only be held vicariously liable for such intentional misconduct when the harassment is "made possible or facilitated by the existence of the actual agency relationship" between

the employer and the harasser. *Faragher v. City of Boca Raton*, 524 U.S. 775, 802 (1998), *citing* Restatement (Second) of Agency § 219 (1957). Only when so empowered may a harasser appropriately be considered to be an "agent" and "supervisor" under Title VII.

The EEOC's Enforcement Guidance (hereafter "Guidance") on vicarious liability under Title VII correctly notes that a "supervisor" for the purpose of imposing vicarious liability need not have the power to take tangible employment actions, such as hiring, firing, promoting, and demoting. EEOC Guidance, Pet. App. 90a-92a. The Guidance is inappropriately elastic however, when it states that vicarious liability may be imposed absent the employer granting the harasser any "actual authority" where, for instance, a victim simply believes the harasser is a "supervisor" because the "chain of command" is "unclear." *Id.* at 92a-93a.

An appropriate test for determining whether an employee is a supervisor for purposes of imposing vicarious liability under Title VII, where the harassment does not result in a tangible employment action, requires a plaintiff to plead and prove that (1) the victim subjectively believes that the harasser has the authority to impact significant, rather than trivial, conditions of employment, (2) the harasser, in fact, possesses such authority, and (3) the existence of a sufficient nexus between the authority conferred and the harassment. That nexus is shown when, as Respondent notes, the authority

materially enables or facilitates the harassment. Res. Br. 24-39.

The primary goal of Title VII is – and should be – "not to provide redress but to avoid harm." *Faragher*, 524 U.S. at 805-06, *citing Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). Harassment prevention has been fully embraced by the higher education community. An appropriate agency-based test for determining who qualifies as a supervisor for purposes of vicarious liability furthers the important preventive goals of Title VII. Clarifying employees' roles and responsibilities in the workplace allows institutions to focus the expenditure of scarce resources on developing and implementing appropriate policies to screen, train and monitor those who have meaningful authority over other employees.

ARGUMENT

There are approximately 4,500 public and private colleges, universities, and community colleges in the United States. Department of Education, *National Center for Education Statistics Integrated Postsecondary Education Data System, Table 275* (2011). American colleges and universities employ nearly four million people in the widest possible array of positions. Department of Education, *National Center for Education Statistics Integrated Postsecondary Education Data System, Human Resources Survey* (2011). Colleges and universities employ not only professionals but also students,

often building work experiences into curricula. Institutions employ persons in a dizzying array of positions – including accountants, animal handlers, attorneys, custodians, deans, faculty members, maintenance personnel, mathematicians, musicians, physicians, scientists, and security guards. Higher education is unmatched in the breadth and diversity of its employees' backgrounds, duties, skills, and employment arrangements.

While employment relationships in many business enterprises are characterized by a "clear chain of command," *Faragher*, 524 U.S. at 781, employment relationships in higher education are often more collaborative and less hierarchical. "Although one might easily identify the 'supervisor' among factory workers . . . one might have more trouble among college professors." *Dutt v. Delaware State College*, 854 F. Supp. 276, 281 (D. Del. 1994) (discussing the meaning of "supervisor" and "agent" under Title VII in tenure and promotion dispute).[2] In the higher education context it can be particularly vexing to classify the relative powers of various employees.

For instance, faculty members often have the power to *recommend* that colleagues obtain or not obtain promotion or tenure but the ultimate decision to confer tenure may be reserved to the institution's curators or trustees. *Compare Dutt, supra, and*

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[2] The word "supervisor" obviously has different meanings in different contexts. This brief focuses exclusively on the meaning and application of that term in the context of litigation commenced under Title VII.

Kumar v. Bd. of Trustees, 774 F.2d 1 (1st Cir. 1985) (ultimate decision to award tenure vested in Chancellor and Board of Trustees). A particular faculty member or administrator may wield significant influence at his or her institution by virtue of reputation and professional standing, but may have no authority over either tangible job actions or the day-to-day activities of particular employees. *See, e.g., Milligan v. Bd. of Trustees of S. Ill. Univ.*, 686 F.3d 378, 382 (7th Cir. 2012) (Title VII claims by student worker regarding alleged harassment by prominent *emeritus* faculty member). Department chairs may have the power to assign colleagues various daily teaching and administrative duties, but may lack authority to take tangible employment actions. Colleges and universities are thus regularly confronted with not only traditional "chain of command" work arrangements, *e.g., Gawley v. Ind. Univ.*, 276 F.3d 301, 310 (7th Cir. 2001) (university police quartermaster's rank in "chain of command" assumed to be supervisor of lower-ranking female officer), but also many non-hierarchical work relationships. *See also Okruhlik v. Univ. of Ark.*, 395 F.3d 872 (8th Cir. 2005) (no analysis conducted as to whether powers of department chair rendered him "supervisor"); *An v. Regents of the Univ. of Cal.*, 94 Fed. Appx. 667 (10th Cir. 2004) (director of research assumed to be supervisor of research assistant without analysis of powers of director).

An inappropriately elastic definition of "supervisor," which exposes institutions to vicarious

liability under Title VII for an employee's intentional misconduct simply because the "chain of command" is "unclear," and even though the employer has done nothing to empower the harasser with authority having a meaningful nexus to the harassment, exposes all employers – and particularly higher education institutions – to excessive potential vicarious liability for that intentional employee misconduct.

I. VICARIOUS LIABILITY UNDER TITLE VII, *ELLERTH*, *FARAGHER*, AND THE EEOC GUIDANCE.

A. Title VII defines "employer" – the party that may be held liable in an action for damages for unlawful discrimination – to include any "agent" of the employer. 42 U.S.C. 2000e(b). Congress has thus explicitly directed that determinations of liability under Title VII must be made in accordance with agency principles. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754 (1998); *Faragher*, 524 U.S. at 791-92. The word "agent," however, is not defined in Title VII and the word most often used to describe an employer's agent in this context – "supervisor" – does not appear in the statute at all.

Under traditional agency principles, the acts of an agent may be imputed to the principal under the familiar doctrine of *respondeat superior*. *Faragher*, 524 U.S. at 796-797; *see, e.g., Jones v. Wittenberg Univ.*, 534 F.2d 1203 (6th Cir. 1976) (university held liable for wrongful death of student caused by

negligent acts of university's security guard under *respondeat superior*). Where an employer does not authorize its agent to engage in the alleged misconduct – or when it does not even have notice of the misconduct – the employer may nonetheless be held vicariously liable under traditional agency principles for such acts committed by agents "outside the scope of employment." *Faragher*, 524 U.S. at 796-797. But describing the outer limits of vicarious liability under such circumstances – particularly in the context of higher education – is difficult at best as courts have justified disparate outcomes based upon a variety of competing policies. *Id.* The application of agency law – which itself is "indefinite and malleable," *id.*, to Title VII is imperfect and has resulted in the use of inconsistent rules regarding vicarious liability.

The differences between the application of agency principles in the contexts of common law torts and Title VII are not insignificant. For instance, under common law rules, both principals and agents may generally be held jointly liable to the injured plaintiff for the agent's tortious conduct. *See, e.g., Wittenberg, supra*, 534 F.2d 1203 (university and police officer jointly liable for wrongful death of student caused by negligent acts of university security guard). Title VII only permits the imposition of entity liability and insulates harassing supervisors from personal liability for their own misconduct. *See, e.g., Greenlaw v. Garrett*, 59 F.3d 994, 1001 (9th Cir. 1995); *Williams v. Banning*, 72 F.3d 552, 554 (7th Cir. 1995). Principals may

initiate third party actions against their agents and others for contribution and an apportionment of liability or fault in common law actions – not so under Title VII. *Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 451 U.S. 77 (1981) (no right of action for contribution under Title VII because not expressly included in statute). Limitations on the availability of common law doctrines to apportion liability or fault under Title VII counsel strongly against an overly broad rule of vicarious liability premised upon expansive definitions of "agent" and "supervisor."

B. Indeed, this Court recognized in *Ellerth* that the "general rule" is that harassment by a supervisor is not conduct "within the scope of employment," and, as a result, employers are not automatically liable for such intentional misconduct committed by those employees. *Ellerth*, 524 U.S. at 757. This Court also held, however, that employers may be held vicariously liable for the intentional misconduct of supervisory employees who act outside of the "scope of their employment" in a limited circumstance: where the harasser is aided in the harassment by the agency relationship. *Id.* at 759; *Faragher*, 524 U.S. at 802-04. Of course, if the harasser is merely a co-worker, then agency principles have no application and the employer may only be held liable if the victim demonstrates that the employer was negligent in either discovering or remedying the harassment. *Ellerth*, 524 U.S. at 759; *Milligan*, 686 F.3d at 383.

In *Faragher*, the Court emphasized that vicarious liability is justified in such circumstances because the harassment is "made possible or facilitated by" the agency relationship between the employer and the harasser. *Faragher*, 524 U.S. at 802. It is clear that vicarious liability may be imposed on employers where harassment culminates in tangible employment actions (such as hiring, firing, promoting, and demoting) – those supervisory acts are clearly made possible by the agency relationship. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 762-63. But this Court's decisions also permit the imposition of vicarious liability committed by employees where the harassment does not culminate in tangible employment actions consistent with agency principles. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. Justice Kennedy acknowledged, however, that whether the agency relation aids in the commission of harassment not culminating in a tangible job action is "less obvious." *Ellerth*, 524 U.S. at 763. It is this "less obvious" milieu that concerns *amici*.

C. When and how does an agency relationship "make possible" or "facilitate" harassment in non-hierarchical employment relationships such as those found on college campuses? When a colleague has the authority to make recommendations about another's promotion, is he or she acting as a "supervisor" under Title VII? When a secretary has the authority to assign administrative tasks to a work study student, is the institution vicariously liable under Title VII for harassment committed by

the secretary unrelated to and disconnected from those tasks?

This Court explicitly declined to announce a hard and fast rule of vicarious liability in *Faragher* and *Ellerth* and left it to litigants and subordinate courts to flesh out the meaning of "agent" and "supervisor" in this context. *Ellerth*, 524 U.S. at 763. The EEOC's Guidance drew its inspiration from these two seminal decisions and attempted to bring a measure of clarity to the outer limits of vicarious liability. The Guidance classifies "supervisors" as either being "in [a] supervisory chain of command" or "outside [a] supervisory chain of command." Guidance, Pet. App. 88a-93a. To be a supervisor within a chain of command, the Guidance states that the employee must have "authority . . . of a sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment." *Id.* at 89a. The Guidance provides that authority is of "sufficient magnitude" when either (1) the employee has the authority to "undertake or recommend" tangible employment actions, or (2) the employee has the authority to "direct [an] employee's daily work activities." *Id.*

The Guidance also states that an employer may be vicariously liable even where the harasser is "outside [the] supervisory chain of command" and lacks "actual authority" over the victim if the victim "reasonably believes the harasser had such power." *Id.* at 92a-93a. The Guidance thus supports the imposition of vicarious liability where the employer

does nothing to empower the harasser with meaningful "authority" that assists the harasser in carrying out the harassment, and apparently where there is no meaningful nexus between the authority granted by the employer and the harassment.

Amici believe that the EEOC Guidance appropriately concludes, consistent with *Faragher* and *Ellerth* but contrary to the test described by the Seventh Circuit in this and other cases,[3] that a harasser need not have the power to make tangible employment actions – such as hiring, firing, promoting, and demoting – in order to meet the definition of a supervisor under Title VII. Petitioner and Respondent agree on this point as well. Pet. Br. 18-42; Res. Br. 26-28. The Guidance is unnecessarily elastic, however, to the extent it includes in the definition of "supervisor" persons who lack any "actual authority" over the victim where, for instance, the victim merely believes that the "chain of command" is "unclear" – a condition that may arise with frequency in collaborative settings like higher education. Guidance, Pet. App. at 93a. Vicarious liability should not be imposed in such circumstances because to do so would elevate subjective beliefs of employees over the foundational requirement of agency law, as applied by the Court in this context, that the authority vested by the

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[3] *See Parkins v. Civil Constructors of Ill., Inc.*, 163 F.3d 1027, 1034 (7th Cir. 1998) (supervisory authority "*primarily* consists of the power to hire, fire, demote, promote, transfer, or discipline an employee) and *Rhodes v. Ill. DOT*, 359 F.3d 498, 506 (7th Cir. 2004) (applying *Parkins* narrowly).

employer in the harasser actually makes possible or facilitates the harassment.

II. RESPONDENT PROPOSES AN APPROPRIATE TEST TO DETERMINE WHO QUALIFIES AS A SUPERVISOR FOR PURPOSES OF THE IMPOSITION OF VICARIOUS LIABILITY UNDER TITLE VII.

A. Courts have obviously struggled to apply agency principles in a consistent way when harassment does not culminate in tangible job actions. Decisions emanating from the higher education context reflect the varying tests and rules. *See, e.g.*, cases, *supra*, at pp. 5-6.

Respondent's proposed test, focusing on whether the authority conferred on the harasser "materially enables" the harassment, appropriately requires claimants to establish a legally meaningful relationship between the authority conferred and the harassment before permitting the imposition of vicarious liability. Res. Br. 24-39. *Amici* thus join Respondent in supporting the adoption of a test for determining when vicarious liability may be imposed absent a tangible employment action that focuses on the nature of the power given by the employer to the harasser, the perception of that power by the victim, and whether that power enables or facilitates the harassment.

Any inquiry concerning the roles of a harasser and a victim should begin by examining the specific tasks or conditions a harasser has the power to impact. Some work tasks are so trivial that authority over them is largely irrelevant to the meaningful terms and conditions of an employee's work experience. While the Guidance correctly notes that "someone who directs only a limited number of tasks or assignments would not qualify as a 'supervisor,'" Guidance, Pet. App. 92a, the number of tasks is only one factor to consider, and is likely less important than the relative burdensomeness of the tasks and whether burdens are shared with other employees. It is unlikely that the power to tell an employee where to park his car on campus, or to require an employee to appear at a department picnic, is meaningful in this context. The authority to require employees to perform tasks routinely undertaken or shared by other employees, where, for instance, all department members serve as marshals at commencement, is also likely not significant here.

On the other hand, employers can clearly confer powers other than hiring, firing, promoting, and demoting that are significant enough to meaningfully impact important conditions of employees' work environments. The authority to assign burdensome and demeaning tasks not shared by other employees, or to single out a victim by scheduling work in an exhausting way, may meaningfully change important aspects of an employee's work environment, particularly when the

burdensome assignments or scheduling is frequent rather than occasional.

The authority to recommend, but not take, tangible employment actions may also be significant but only if the harasser's "recommendation is given substantial weight by the final decision maker." Guidance, Pet. App. 91a. However, if colleagues are routinely asked for input on raises or promotions of other colleagues, but the decisions are, in fact, reserved to administrators or faculty other than the harasser, then the power to merely recommend is insufficient to warrant the imposition of vicarious liability in this context. *Id.* Similarly, if all university employees have the power to report misconduct by other employees but the administration is tasked with investigating and ultimately deciding whether or not to discipline, then the power to report, in and of itself, is insufficient to impose vicarious liability. When the power to recommend or report is given generally to employees, it is indistinguishable from any number of other powers conferred to co-workers and cannot reasonably support vicarious liability.

Even if a harasser is, in fact, conferred authority over the victim's significant tasks or conditions of employment, vicarious liability should not be imposed if the victim does not subjectively perceive the harasser's powers to be significant. *Ellerth,* 524 U.S. at 763; *Faragher,* 524 U.S. at 803. As Justice Marshall emphasized in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986), it is "precisely because

the supervisor is understood to be clothed with the employer's authority" that he or she is able to harass his or her subordinate victim. *Id.* at 77. If the victim does not "understand" that the harasser has the power to alter significant aspects of his or her employment, then the victim is happy to tell the harasser "where to go." *Faragher,* 524 U.S. at 803; Res. Br. pp. 23, 35-37. In such circumstances, the harasser's authority, not perceived by the victim, cannot reasonably push the harasser over the line separating co-workers from supervisors to warrant the imposition of vicarious liability.

Moreover, it should not be enough to impose vicarious liability that the particular authority conferred upon the harasser is both objectively and subjectively significant. To be consistent with this Court's aided-in-agency analysis, the power given to the harasser must materially enable or facilitate the harassment – and thus have a meaningful nexus to the intentional misconduct about which the victim complains. Res. Br. 24-28; *Mack v. Otis Elevator Co.*, 326 F.3d 116, 125 (2d Cir. 2003). If, for instance, an employer gives a harasser the power to assign menial duties but there is no nexus between that authority and the harassment (the record is devoid of proof of actual assignment or threats of assignment), then vicarious liability should not be imposed. If an employer vests a harasser with the power to change another employee's work schedule in a material way, but the harassment does not include changes or real threats of schedule alteration, then no meaningful connection exists

between that authority and the harassment. In this regard, the harasser and victim are no different than any other co-workers because whatever power the harasser possesses is irrelevant to the harassment.

Thus, in order to establish a claim of vicarious liability where the harassment does not culminate in a tangible employment action, a plaintiff should be required to plead[4] and prove that (1) he or she subjectively believes that the harasser possesses powers to alter significant[5] rather than trivial conditions of the victim's employment; (2) the harasser, in fact, possesses the authority to alter the

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[4] *See Hoskins v. Howard Univ.*, 839 F. Supp.2d 268 (D.D.C. 2012) (alleged harasser, a Director of Finance, considered to be co-worker where plaintiff, an Assistant Director for Training, did not plead facts demonstrating Director had supervisory powers in Title VII hostile environment case).

[5] To be sure, a trial court may consider whether, as a matter of law, an alleged harasser has authority over sufficiently significant duties in the same way that courts decide whether harassment is sufficiently "severe" or "pervasive" to warrant a trial. *See, e.g., Stewart v. Miss. Transp. Comm'n*, 586 F.3d 321 (5th Cir. 2009) (affirming summary judgment because harassment was neither severe nor pervasive as a matter of law); *Russell v. Bd. of Trustees of Univ. of Ill. at Chicago*, 243 F.3d 336 (7th Cir. 2001) (same); *Devin v. Schwan's Home Serv.*, 491 F.3d 778 (8th Cir. 2007) (same); *Vasquez v. County of Los Angeles*, 349 F.3d 634 (9th Cir. 2003) (same); *Gupta v. Florida Bd. of Regents*, 212 F.3d 571 (11th Cir. 2001) (reversing jury verdict for professor on Title VII hostile environment claim because harassment was not sufficiently severe or pervasive).

victim's significant work conditions; and (3) the existence of a nexus between the harasser's authority and the resulting harassment so that the authority actually conferred to the harasser materially enabled or facilitated the harassment.

B. This formulation of the appropriate inquiry is consistent with this Court's decisions and other relevant cases. In *Faragher*, the harassers – from both a subjective and an objective point of view – had power over significant aspects of Faragher's work experience. *Faragher*, 524 U.S. at 808 (harassers had power to directly control "all aspects" of Faragher's "daily activities"). Moreover, there was a clear nexus between the powers conferred upon the harassers and the resulting harassment. *Id.* at 780 ("date me or clean toilets for a year"). The same is true in *Ellerth* where the harasser's power to "make hiring and promotion decisions" subject to another supervisor simply "sign[ing] the paperwork" and Ellerth's perception of that power, was directly connected to the harassment. *Ellerth,* 524 U.S. at 747-48 (threats that the harasser could make Ellerth's life "very hard or very easy" in context of overt sexual comments).

Other cases decided both before and after *Faragher* and *Ellerth* support this formulation. For instance, in *Torres v. Pisano*, 116 F.3d 625, 633-34, (2d Cir. 1997), *cert. denied*, 522 U.S. 997 (1997), the Second Circuit carefully applied agency principles and held that in order to establish vicarious liability absent a tangible employment action a plaintiff must

"establish a nexus between the supervisory authority" and the harassment. *Id.*, 116 F.3d at 635. From both a subjective and an objective point of view, the harasser in *Torres* had the authority to affect significant conditions of employment, but the Court concluded that under the facts presented in the summary judgment record, the plaintiff's claim that the harasser's powers "facilitated the harassment" was "too attenuated." *Id.*

In *Mack v. Otis Elevator Co.*, 326 F.3d 116 (2d Cir. 2003), a case relied upon heavily by both Petitioner and Respondent, the Court cited *Torres* and noted that vicarious liability may be imposed where the agency relationship "facilitates" the harassment – apparently drawing on language used in both *Torres* (116 F.3d at 635) and *Faragher* (524 U.S. at 802). *Mack*, 326 F.3d at 124. The Court held that vicarious liability, absent a tangible employment action, "depends on whether the power – economic or otherwise" of the harasser who is alleged to be a supervisor "enabled the harasser or materially augmented" his or her ability to harass the victim. *Id.* at 125. *See also Stayner v. Ohio Dep't of Rehab. & Corr.*, 2011 U.S. Dist. LEXIS 100099 (S.D. Ohio Sept. 6, 2011) (using "materially augmented" standard and holding it consistent with Sixth Circuit's "control over conditions of employment" test). Thus, under *Torres* and *Mack*, the authority conferred on the harasser must actually "facilitate" or "enable" or "augment" the harassment and therefore have a real nexus to the harm suffered by the victim.

C. The proposed test is, in most respects, in harmony with the EEOC's Guidance. The Guidance describes the authority giving rise to vicarious liability as "of sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment." Guidance, Pet. App. 89a. Power that is of "sufficient magnitude" is the power to impact significant conditions of employment. The Guidance also recognizes that the subjective perception of meaningful authority by victims of harassment is important in this context, noting that "if the employee reasonably believed that the harasser had such power" then vicarious liability may be imposed. *Id.* at 93a.

The Guidance inappropriately concludes, however, that vicarious liability may be imposed even though the harasser lacks "actual authority over the employee" where the "chain of command" is "unclear." *Id.* at 92a-93a. Here, in abandoning the requirement of proof of actual authority over significant conditions of employment, it appears that the Guidance inappropriately adopts a broad rule of apparent authority and elevates the importance of the form of harassers' titles or designations over the substance of harassers' actual authority and use of that power. This is not only inconsistent with the EEOC's directive to focus on the "job function rather than job title," *id.* at 89a-90a, but also with various courts' holdings. *Compare Wilson v. Moulison North Corp.*, 639 F.3d 1, 10 (1st Cir. 2011) (title such as foreman "does not transmogrify a line employee into a supervisor for Title VII purposes") *and EEOC v.*

CRST Van Expedited, Inc., 679 F.3d 657, 685 (8th Cir. 2012) (rejecting application of apparent authority altogether in this context); *but see Rubidoux v. Col. Mental Health Institute*, 173 F.3d 1291 (10th Cir. 1999) (recognizing availability of "apparent authority" to establish harasser was "supervisor" for purposes of imposing vicarious liability). *Amici*, Petitioner, and Respondent agree that a principled test should not be tied to nomenclature but rather grounded in an examination of actual power conferred to harassers and the way that power is used in the workplace. Pet. Br. 51; Res. Br. 31-32. Analysis that is not shackled to titles and designations is particularly important in the realm of higher education where titles are often at odds with the decidedly non-hierarchical work arrangements.

The Guidance also references temporary or intermittent abuse of authority as potentially supporting the imposition of vicarious liability absent tangible employment actions. Guidance, Pet. App. 92a. It is certainly relevant for a court to consider whether the intermittent nature of the use of power renders it insufficient to support a meaningful nexus between authority and harassment. As Respondent appropriately notes, "[s]upervisory authority that the harasser does not possess when he commits the harassment obviously cannot enable that same harassment." Res. Br. 37. Moreover, the intermittent nature of the use of authority may be relevant to the inquiry as to

whether a victim subjectively perceives the harasser to be his or her supervisor.

Finally, although the Guidance does not mention the relevance of a victim's relative isolation from persons with supervisory powers other than the harasser, *amici* agree with Respondent's suggestion that a victim's access to or separation from supervisors who may intercede to prevent harassment may well be relevant to a court's inquiry. Res. Br. 37. For instance, a university employee who has other supervisory personnel on site may not perceive the harasser to have meaningful authority over significant conditions of his or her work. The presence of other on-site supervisors may also be relevant to show that the harasser did or did not, in fact, have such authority.

III. THE PRIMARY GOAL OF TITLE VII IS TO PREVENT HARASSMENT.

The "primary objective" of Title VII is not to "make persons whole for injuries" but rather to "avoid harm" in the first place. *Faragher*, 524 U.S. at 806. The Court in *Faragher* noted that employers must have an "incentive" to avoid harm and the imposition of vicarious liability may provide such an incentive. *Id.* But the Court also recognized that an appropriately balanced standard for the imposition of vicarious liability should "give credit" to employers who "make reasonable efforts" to prevent harassment. *Id.* The primary means that this Court employed to achieve an appropriate balance was the

adoption of the affirmative defense to vicarious liability where the harassment does not culminate in a tangible employment action. This defense, of course, is premised upon employers' development and use of measures (such as policies) to prevent and correct harassment and a concomitant failure of the victim to avail himself or herself of such measures. *Id.* at 806-808; *Ellerth*, 524 U.S. at 765.

The Court's strategy clearly had its intended effect in the area of higher education as a perusal of anti-harassment policies, training programs, and other preventive measures demonstrates. *See, e.g.*, College and University Personnel Association, *Sexual Harassment: A Sourcebook of Policies in Colleges and Universities*, CUPA (1999); Euben, *Sexual Harassment in the Academy: Some Suggestions for Faculty Policies and Procedures*, AAUP (2002). The implementation of anti-harassment policies and training programs in the higher education community is ubiquitous.

The adoption of the proposed practical test for determining who qualifies as a "supervisor" under Title VII in this context also supports the important goal of harassment prevention. Justice Souter referenced the obvious "virtue of categorical clarity" when discussing the challenges related to determining the contours of vicarious liability under Title VII for intentional misconduct of employees. *Faragher*, 524 U.S. at 800-01. Brighter lines provide employees and employers alike with the opportunity

for clearer understanding of their respective rights and obligations regarding workplace harassment.

Moreover, this Court supported its decision to impose vicarious liability in the context of supervisory harassment not culminating in tangible employment actions by noting that "the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, to train them, and to monitor their performance." *Faragher*, 524 U.S. at 803. Using a test that appropriately limits the definition of "supervisor" to those conferred the authority to impact significant conditions of employment enhances the ability of institutions to screen, train and monitor such persons; an unbounded and expansive definition has the opposite effect.

In the context of higher education in particular, the careful allocation of scarce resources to preventive measures, such as targeted supervisor training, is surely better than devoting resources to litigation. While the test employed by the Seventh Circuit is salutary in its definitiveness, it falls short of adhering to the foundational agency principles adopted in *Faragher* and *Ellerth*. Respondent's formulation, as restated here, meets both the requirements of precedent and furthers the compelling goal of preventing harassment in all contexts, including on campus.

CONCLUSION

Amici respectfully request that this Court adopt Respondent's formulation of an agency-based test for determining who qualifies as an "agent" or "supervisor" for purposes of imposing vicarious liability for harassment violating Title VII, as restated here, where that harassment does not culminate in a tangible employment action. Additionally, *amici* join in Respondent's request that the judgment of the court of appeals in favor of Respondent be affirmed. Most importantly, *amici* remain committed to the eradication of unlawful harassment and discrimination on campus.

October 25, 2012

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APPENDIX

APPENDIX

Descriptions of the Additional *Amici Curiae*

The American Association of Community Colleges (AACC) is the primary advocacy organization for the nation's community colleges. It represents nearly 1,200 two-year, associate degree-granting institutions.

The American Association of State Colleges and Universities (AASCU) is a Washington-based higher education association of more than 400 public colleges, universities and systems whose members share a learning- and teaching-centered culture, a historic commitment to underserved student populations and a dedication to research and creativity that advances their regions' economic progress and cultural development. AASCU members enroll nearly 4 million students.

The Association of Governing Boards of Universities and Colleges (AGB) is the only national association that serves the interests of academic governing boards, boards of institutionally related foundations and campus chief executive officers and other senior-level governance and leadership. AGB includes 1,900 institutions of higher learning and serves nearly 1,300 boards, both publicly supported and independent. The Association also serves more than 36,000 individuals, including trustees and

regents, campus and public college and university foundation chief executive officers, board professionals and staff members and senior level administrators. AGB's mission is to strengthen, protect and advocate on behalf of citizen trusteeship in ways that support and advance higher education.

The Association of Public and Land-grant Universities (A·P·L·U), founded in 1887, is a research and advocacy organization of public research universities, land-grant institutions, and state university systems. As the nation's oldest higher education association, A·P·L·U is dedicated to excellence in learning, discovery and engagement. Member campuses enroll more than 3.5 million undergraduate and 1.1 million graduate students, employ more than 645,000 faculty members, and conduct nearly two-thirds of all university-based research, totaling more than $34 billion annually. For more information, visit www.aplu.org

The Higher Education Council of the Employment Law Alliance (ELA)[6] collectively represents hundreds of institutions of higher education throughout the United States. The Council includes the following United States law firms with labor and

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[6] The ELA is an integrated, global practice network comprised of independent law firms that are distinguished for their practice in employment and labor law. With more than 3,000 experienced attorneys located in more than 130 countries, it is the world's largest network of labor and employment lawyers.

employment practices and significant expertise in the field of higher education:[7]

- Bond, Schoeneck & King, PLLC
- Dinse, Knapp & McAndrew, P.C.
- Dinsmore & Shohl LLP
- Edwards Wildman Palmer LLP
- Gray Plant Mooty
- Hirschfeld Kraemer LLP
- Lathrop & Gage LLP
- Miller Nash LLP
- Parker Poe Adams & Bernstein LLP
- Pierce Atwood LLP
- Reed Smith LLP
- Shawe Rosenthal LLP
- Tueth Keeney Cooper Mohan & Jackstadt, P.C.
- Sturgill, Turner, Barker & Moloney, PLLC

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[7]A full list of firms in the Higher Education Council includes international members Anjarwalla & Khanna; Fromont-Briens; and Rajah & Tann, LLP.

AMICUS CURIAE BRIEF

No. 11-556

IN THE

Supreme Court of the United States

MAETTA VANCE,

Petitioner,

v.

BALL STATE UNIVERSITY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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INTEREST OF *AMICUS CURIAE* [1]

The Chamber of Commerce of the United States of America is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million U.S. companies and professional organizations of every size. The Chamber represents the interests of its members by filing *amicus curiae* briefs in cases involving issues of vital concern to the nation's business community, including the scope of Title VII of the Civil Rights Act of 1964. For example, the Chamber previously filed briefs before this Court in *Wal-Mart Stores, Inc. v. Dukes* and *Ledbetter v. Goodyear Tire & Rubber Co.*

The Chamber's members operate in nearly every industry and business sector in the United States, and many of its members are subject to Title VII—the statute at the heart of this case. The Chamber's members devote extensive resources to developing employment practices and programs designed to ensure compliance with Title VII and other civil-rights statutes.

The Chamber's members have a substantial interest in this case because the standard adopted by this Court to govern automatic "supervisor" liability for employers under Title VII directly impacts how they plan and execute their anti-harassment efforts.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae*, its members, or *amicus*'s counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of *amicus* briefs have been filed with the Clerk of the Court.

Approving the bright-line standard applied by the First, Seventh, and Eighth Circuits will make it far easier for employers to identify who among their employees qualifies as a "supervisor" and, consequently, where and how best to direct measures that effectively prevent workplace harassment—Title VII's primary objective.

SUMMARY OF ARGUMENT

This case will not decide what constitutes actionable workplace harassment. Nor will it decide whether an employer may be legally responsible for workplace harassment committed by its employees. Instead, this case will decide when an employer may be held *automatically* liable for harassment between employees. That question hinges on the definition of "supervisor."

Workplaces vary widely. So do workplace hierarchies. No legal definition of "supervisor" will ever perfectly capture the on-the-ground realities of any given workplace—let alone *every* workplace governed by Title VII. Thus, whatever definition of "supervisor" this Court approves will inevitably exclude some employees who may be in a position to harass other employees.

But Title VII's "primary objective" is to prevent workplace harassment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998) (internal quotation marks omitted). It follows that the best definition of "supervisor" is one that is most likely to encourage employers to prevent such abuse. The First, Seventh, and Eighth Circuits apply a bright-line definition of "supervisor" that covers the core facets of the role: "the power to hire, fire, demote, promote, transfer, or discipline an employee." *Parkins v. Civil Construc-*

tors of Ill., Inc., 163 F.3d 1027, 1034 (7th Cir. 1998). This bright-line definition serves the salutary purpose of providing employers with clear guidance as to who wields the power that, if abused, may subject employers to automatic liability. Employers that readily can identify the "supervisors" who might trigger automatic liability have more incentive to screen, train, and monitor those employees, and to do so effectively. This bright-line definition best promotes Title VII's primary objective. By contrast, the open-ended definitions of "supervisor" adopted by some circuits and the EEOC provide employers virtually no guidance and therefore little incentive to undertake effective prevention efforts.

Workplace abuse will not go unchecked simply because the harasser is not a "supervisor" under a bright-line definition. Rather, in cases at the margin, plaintiffs will have the burden of proving the employer's negligence in failing reasonably to detect and stop the harassment—which is plaintiffs' burden normally in hostile-work-environment cases. The substantial benefits of promoting more targeted, effective preventative efforts outweigh the modest cost of returning a trial burden to plaintiffs. In short, the ounce of prevention is worth more than the pound of cure.

The bright-line definition is not foreclosed by the Court's decision in *Faragher v. City of Boca Raton*. The question of how to define "supervisor" was not before the Court in that case—indeed, the parties did not dispute the "supervisor" status of the harassers in *Faragher*. Although this question may have "lurk[ed] in the record," the Court did not rule squarely upon it. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) (internal quotation

marks omitted). The Court accordingly should consider the matter fresh.

If the Court ultimately rejects the bright-line definition, it nevertheless should impose meaningful and workable limits on the threshold for automatic liability. These limits will help to offset the damage caused by the over-breadth of whatever otherwise open-ended definition of "supervisor" the Court adopts.

Finally, no matter what definition of "supervisor" the Court applies, Petitioner here fails to establish that her alleged harasser was a supervisor for purposes of automatic vicarious liability. The Court thus should affirm the judgment of the Seventh Circuit.

ARGUMENT

I. THE COURT SHOULD APPROVE THE BRIGHT-LINE DEFINITION OF "SUPERVISOR" USED BY THE FIRST, SEVENTH, AND EIGHTH CIRCUITS

A. A Bright-Line Definition Of "Supervisor" Best Promotes Title VII's Primary Objective Of Avoiding Harm

Title VII's "primary objective . . . is not to provide redress but to avoid harm." *Faragher*, 524 U.S. at 806 (citation and internal quotation marks omitted). The statute seeks to achieve this objective by "encourag[ing] the creation of antiharassment policies and effective grievance mechanisms." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998). The statute likewise threatens employers with liability if they are negligent in failing to detect and stop workplace harassment between employees. *See id.* at 759.

Title VII further seeks to "avoid harm" by holding employers vicariously liable for workplace harass-

ment committed by their supervisory employees. This threat of automatic vicarious liability encourages employers to focus their preventative efforts (and limited resources) where they will do the most good: on those employees most likely to wield, and potentially abuse, the "official power of the enterprise." *Id.* at 762. Because "employers have greater opportunity and incentive to screen [supervisors], train them, and monitor their performance," employers have "a greater opportunity to guard against misconduct by supervisors than by common workers." *Faragher*, 524 U.S. at 803.

The definition of "supervisor" directly affects how effectively Title VII's automatic-liability regime encourages employers to prevent harassment by supervisors—as opposed to compensates victims. Any definition of "supervisor" that turns on the scope of duties is inherently vague. Workplaces and workplace hierarchies in this country vary widely, and the trend in recent years has been away from traditional top-down hierarchies and toward "the use of autonomous or self-regulated teams" comprised of "'quasi-overseer' employees." *Miss. Power & Light Co. & Int'l Bhd. of Elec. Workers*, 328 N.L.R.B. 965, 971 (1999), *abrogated on other grounds by Entergy Gulf States, Inc. v. NLRB*, 253 F.3d 203 (5th Cir. 2001); *see also Dinkins v. Charoen Pokphand USA, Inc.*, 133 F. Supp. 2d 1254, 1267 (M.D. Ala. 2001) ("Radical economic changes are blurring the distinction between labor and management. The concept of the 'overseer,' who has the apparent authority to supervise, is not as uncommon as in the past."). Simply put, in many workplaces the distinction between "supervisor" and "common worker" is unclear.

Accordingly, to best promote Title VII's "primary objective" of preventing workplace harassment, the definition of "supervisor" used to impose automatic liability should be one that is clear and easy for employers to apply prophylactically to guide their compliance efforts, before the onset of litigation. The definition likewise should be the one most likely to include the core group of employees entrusted with the "official power of the enterprise." The realities of today's workplace call for a bright-line definition that captures "the essence of supervisory status." *Parkins*, 163 F.3d at 1034.

1. The First, Seventh, and Eighth Circuits have approved such a bright-line definition of "supervisor." These courts impose automatic liability only if the harassing employee has "the authority to affect the terms and conditions of the victim's employment," *i.e.*, "the power to hire, fire, demote, promote, transfer, or discipline an employee." *Id.*; *accord Noviello v. City of Boston*, 398 F.3d 76, 96 (1st Cir. 2005); *Joens v. John Morrell & Co.*, 354 F.3d 938, 940–41 (8th Cir. 2004).[2] The harassing employee must be empowered by the employer "'to make economic decisions affecting [the plaintiff].'" *Merritt v. Albemarle Corp.*, 496 F.3d 880, 884 (8th Cir. 2007) (quoting *Pa. State Police v. Suders*, 542 U.S. 129, 144 (2004)). The harassing

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[2] *See also Griffin v. Harrisburg Prop. Servs., Inc.*, 421 F. App'x 204, 209 (3d Cir. 2011) (applying *Parkins*); *Johnson v. Shinseki*, 811 F. Supp. 2d 336, 347–48 (D.D.C. 2011) (applying *Parkins*); *Browne v. Signal Mountain Nursery, L.P.*, 286 F. Supp. 2d 904, 913, 918 (E.D. Tenn. 2003) (applying *Parkins* and concluding that "[t]he authority entrusted in a supervisory employee need not be plenary or absolute, but it must encompass, in some significant way, the power to initiate, recommend, or effect tangible employment actions affecting the economic livelihood of the supervisor's subordinates").

employee is not deemed a "supervisor" absent the power to make tangible employment decisions against the plaintiff. *See Ellerth*, 524 U.S. at 761–62 (defining "tangible employment decision").

Under this definition, merely "directing work activities and recommending disciplinary action are not in and of themselves sufficient to make a supervisor under Title VII." *Andonissamy v. Hewlett-Packard Co.*, 547 F.3d 841, 848 (7th Cir. 2008); *accord Bryant v. Jones*, 575 F.3d 1281, 1300 (11th Cir. 2009); *Merritt*, 496 F.3d at 883. Nor is it enough that the harassing employee has the power to decide which of the plaintiff's normal work duties he or she must perform on a given day. *See EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 684 (8th Cir. 2012); *Merritt*, 496 F.3d at 884; *Rhodes v. Ill. Dep't of Transp.*, 359 F.3d 498, 506 (7th Cir. 2004). And the harasser's mere apparent authority does not transform him or her into a "supervisor." *See CRST Van Expedited, Inc.*, 679 F.3d at 685; *Weyers v. Lear Operations Corp.*, 359 F.3d 1049, 1057 n.7 (8th Cir. 2004).

The definition applied by the First, Seventh, and Eighth Circuits appropriately gives employers clear notice of which employees may subject them to automatic liability for workplace harassment—and, therefore, which employees the employers should be particularly careful to screen, train, and monitor. This definition also effectively captures the "essence of supervisory status." "[E]mployers do not entrust mere co-employees with any significant authority with which they might harass a victim . . . ." *Parkins*, 163 F.3d at 1032. By encouraging focused and deliberate preventative efforts on a discrete group of employees, this definition promotes the

avoidance of workplace harassment. *See* Jodi R. Mandell, Note, Mack v. Otis Elevator: *Creating More Supervisors and More Vicarious Liability for Workplace Harassment*, 79 St. John's L. Rev. 521, 549 (2005).

2. By contrast, some courts have adopted much broader, highly fact-driven definitions of "supervisor." Unlike the bright-line definition applied by the First, Seventh, and Eighth Circuits, the broad definitions adopted by these courts provide insufficient notice to employers and therefore hamper employers' ability to "avoid harm."

The Second Circuit, for example, defines "supervisor" to include employees with the power to "direct the particulars of . . . [the plaintiff's] work days, including . . . work assignments." *Mack v. Otis Elevator Co.*, 326 F.3d 116, 125 (2d Cir. 2003). The Fourth Circuit considers "'whether as a practical matter [the harasser's] employment relation to the victim was such as to constitute a continuing threat to her employment conditions that made her vulnerable to and defenseless against the particular conduct in ways that comparable conduct by a mere co-worker would not.'" *Whitten v. Fred's, Inc.*, 601 F.3d 231, 244 (4th Cir. 2010) (quoting *Mikels v. City of Durham*, 183 F.3d 323, 333 (4th Cir. 1999)). The Ninth Circuit uses an even murkier standard that defines "supervisor" to include any employee who "has the authority to demand obedience from [the plaintiff]." *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1119 n.13 (9th Cir. 2004).

In an effort to give context to these formless and elastic definitions, courts also have considered the harasser's on-the-job seniority vis-à-vis the plaintiff to determine the harasser's "supervisor" status. *See,*

e.g., *Whitten*, 601 F.3d at 245–46; *Mack*, 326 F.3d at 125. Courts likewise have looked to the presence or absence at the work site of employees more senior than the harasser. *See, e.g.*, *Whitten*, 601 F.3d at 246; *Mack*, 326 F.3d at 125. And some courts consider whether the plaintiff *subjectively* believed that the harassing co-worker was a supervisor. *See, e.g.*, *Whitten*, 601 F.3d at 246. The uncertainty inherent in these open-ended definitions undermines Title VII's "primary objective" of harassment prevention in two critical ways.

First, the nebulous threshold for "supervisor" status advanced by these definitions makes it *more* difficult for employers to engage in preventive "forethought." *Ellerth*, 524 U.S. at 764; *Faragher*, 524 U.S. at 807; *see also Browne*, 286 F. Supp. 2d at 914. Vague, fact-specific, or "totality of the circumstances" definitions provide employers no practical basis to distinguish between indisputable supervisors, whom employers deliberately entrust with the power to take tangible employment actions against the plaintiff, and otherwise "common workers" who have some limited oversight of the plaintiff merely by virtue of the idiosyncrasies of their unique workplaces. The unique workplace factors that courts have considered in applying these definitions are equally unhelpful. These factors—the harasser's relative seniority, the on-site presence of even more senior supervisors, and the plaintiff's subjective beliefs—can change on a daily basis, without notice, and often are beyond the employer's knowledge or control. Indeed, these definitions sweep so broadly that they could anoint many of an employer's employees as "supervisors" for purposes of automatic liability under Title VII at one time or another. *See Browne*, 286 F. Supp. 2d at 914 (rejecting *Mack* because "[t]he sheer numerosity of

potential supervisors" it creates is antithetical to the spirit of *Ellerth* and *Faragher*). "[I]f an employer cannot determine who qualifies as a supervisor, there may simply be too many employees for the company to carefully select, train, and monitor." Mandell, *supra*, at 549.

Second, by leaving unclear who qualifies as a "supervisor," these definitions encourage employers to diffuse their limited resources, thereby resulting in less effective screening, training, and monitoring of so-called "supervisors." Comprehensive screening, training, and monitoring of a larger, more diversified group of purported "supervisors" is more difficult to develop and properly administer than targeted efforts. And scattershot compliance measures inevitably are less effective than (and could displace) more thorough compliance measures aimed at those most likely to abuse the official power of the enterprise—traditional supervisors. *See id.* at 549–50.

Ultimately, these definitions force employers to confront an untenable catch-22. On the one hand, employers could broaden their preventative efforts to cover more so-called "supervisors," yet still run the substantial risk of automatic liability because these efforts would be less effective at preventing workplace harassment. On the other hand, employers could continue to focus their compliance efforts on traditional supervisors, but risk being potentially unable to disprove their negligence as an affirmative defense to automatic liability for harassment by those purported "supervisors" who received no additional screening, training, and monitoring. Because neither of these choices gives employers incentives to prevent harm, the open-ended definitions of "supervisor" that

spawn these choices are fundamentally "at odds with [Title VII's] statutory policy." *Faragher*, 524 U.S. at 806.

B. The EEOC's Open-Ended Definition Of "Supervisor" Provides Employers With Inadequate Guidance And Is Not Entitled To Deference

The EEOC, like the Second, Fourth, and Ninth Circuits, also endorses an open-ended, fact-specific definition of "supervisor" that would include employees who "ha[ve] authority to direct the [plaintiff's] daily work activities." EEOC, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, 8 FEP Manual (BNA) 405:7654 (1999), *available at* 1999 WL 33305874 (reproduced at Pet. App. 81a–93a) (EEOC Guidance). The EEOC's definition generally considers whether the "ability to commit harassment is *enhanced* by [the harasser's] authority to increase the employee's workload or assign undesirable tasks." Pet. App. 91a (emphasis added).

But like the open-ended definitions of "supervisor" applied by the Second, Fourth, and Ninth Circuits, the EEOC's definition only obfuscates the line between "supervisor" and "common worker." The EEOC's definition does not explain what it means for the ability to harass to be "enhanced," as opposed to simply "aided." *Faragher*, 524 U.S. at 804. Nor does the EEOC definition meaningfully clarify the minimum duration and scope of the harasser's authority over the plaintiff's work activities necessary to render the harasser a "supervisor." Although the EEOC says that employees who are "temporarily authorized to direct [the plaintiff's] daily work activities" are supervisors "during that time period," Pet. App. 92a,

the EEOC neither defines nor qualifies the meaning of "temporarily." The EEOC further states that "supervisors" do not include employees who "merely relay[] other officials' instructions regarding work assignments and report[] back to those officials," nor employees "who direct[] only a limited number of tasks or assignments," such as "coordinating a work project of limited scope." Pet. App. 92a. Yet the EEOC does not qualify the meaning of either "limited number" or "limited scope."

Consequently, employers cannot in advance readily apply the EEOC's definition of "supervisor" to decide where and how best to deploy their limited resources to both prevent workplace harassment and avoid automatic liability for the misconduct of so-called "supervisors." Indeed, the weakness of the EEOC's definition as a guidepost for employers' preventative measures is evident from the fact that the parties (and the United States) seemingly agree that the EEOC's definition is correct yet continue to reach starkly different conclusions about the status of Petitioner's alleged harasser at this advanced stage of the litigation. Like the Second, Fourth, and Ninth Circuits' unhelpful definitions, the EEOC's definition fails to provide employers with the proper incentives and guidance needed to achieve Title VII's "primary objective" of "avoid[ing] harm." *Faragher*, 524 U.S. at 806 (internal quotation marks omitted).

Moreover, contrary to the position advanced by the United States, U.S. Br. 26–29, the EEOC's enforcement guidance is not entitled to any deference because it amounts to little more than the agency's interpretation of this Court's decisions in *Faragher* and *Ellerth*. *See* Pet. App. 91a–92a & nn.23–24. "Agencies have no special claim to deference in their

interpretation of [the Court's] decisions." *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 642 n.11 (2007) (citing *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336 n.5 (2000)).

C. Approving The Bright-Line Definition Will Not Absolve Employers Of Liability But Instead Merely Adjust Litigation Burdens

Critically, no matter how "supervisor" is defined, victims of workplace harassment can still pursue and potentially recover on their claims even if the harasser ultimately is not deemed a "supervisor." Thus, approving the bright-line definition of "supervisor" used by the First, Seventh, and Eighth Circuits will not insulate employers from liability for actionable harassment by employees who fail to meet this definition. To the contrary, approving the bright-line definition will simply return to plaintiffs the burden of proving their employer's negligence, and only in cases where no tangible employment action has resulted.

1. An employer's alleged negligence plays a central role in most workplace harassment cases because "[n]egligence sets a minimum standard for employer liability under Title VII." *Ellerth*, 524 U.S. at 759. An employer is negligent when it "knew or should have known about the [harassing] conduct and failed to stop it." *Id.*

When the harasser is a mere co-worker, the plaintiff bears the burden of proving affirmatively that the employer was negligent. *Id.* When the harasser is a "supervisor with immediate (or successively higher) authority over the [plaintiff]," *id.* at 765—and if no tangible employment action results—the employer is

automatically liable for the harassment unless it proves that it was not negligent in "prevent[ing] and correct[ing] promptly any . . . harassing behavior" and that the plaintiff was negligent in avoiding the harm. *Id.* at 765. If the harasser-supervisor "takes a tangible employment action against the [plaintiff]," the employer is strictly liable. *Id.* at 760.

Thus, the harasser's status effectively determines who bears the burden of proving the employer's negligence when no tangible employment action occurs. The harasser's status is not dispositive of a plaintiff's claims nor an employer's affirmative defense to automatic liability. Even when a plaintiff fails to establish that the harasser was a "supervisor"—which would shift the burden to the employer to prove that it was not negligent—courts regularly proceed to determine whether the plaintiff has proven the employer's negligence. *See, e.g.*, *Ryan v. Capital Contractors, Inc.*, 679 F.3d 772, 779 (8th Cir. 2012); *Andonissamy*, 547 F.3d at 849; *Merritt*, 496 F.3d at 885; *Cheshewalla v. Rand & Son Constr. Co.*, 415 F.3d 847, 851 (8th Cir. 2005); *Noviello*, 398 F.3d at 97; *Rhodes*, 359 F.3d at 506; *Hall v. Bodine Elec. Co.*, 276 F.3d 345, 356 (7th Cir. 2000); *Parkins*, 163 F.3d at 1035. That is what the lower courts did in this case. *See Vance v. Ball State Univ.*, 646 F.3d 461, 470–71 (7th Cir. 2011) (Pet. App. 13a); *Vance v. Ball State Univ.*, No. 1:06-cv-1452, 2008 WL 4247836, at *12 (S.D. Ind. Sept. 10, 2008) (Pet. App. 55a).

2. If the facts support a violation of Title VII, plaintiffs can readily meet their burden of establishing the employer's negligence—and often reach a jury on the issue—even in those circuits that apply the bright-line definition of "supervisor."

In *Noviello*, for example, after finding that the harasser was not a "supervisor" under the bright-line definition, the First Circuit concluded that the plaintiff nevertheless was entitled to a jury trial on her co-worker harassment claim because there was sufficient evidence that the employer had actual notice of the hostile work environment yet "did nothing to dispel it." 398 F.3d at 97. Similarly, in *Phelan v. Cook County*, the Seventh Circuit held that the plaintiff's co-worker claim should have gone to a jury because there was evidence that the plaintiff "continually complained of physical and verbal abuse in both of her work stations" and that the plaintiff's transfer to another location was inadequate to remedy the harassment. 463 F.3d 773, 785–86 (7th Cir. 2006). And in *Engel v. Rapid City School District*, the Eighth Circuit concluded that summary judgment should not have been granted as to the plaintiff's co-worker claim because there was evidence both that the hostile work environment continued after the employer's attempted remedial actions and that the employer failed to sufficiently respond further. 506 F.3d 1118, 1127 (8th Cir. 2007); *see also Hoyle v. Freightliner, LLC*, 650 F.3d 321, 335–36 (4th Cir. 2011) (genuine issue of material fact remained as to the employer's negligence); *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 341–44 (6th Cir. 2008) (same); *Andreoli v. Gates*, 482 F.3d 641, 648–49 (3d Cir. 2007) (same); *cf. Whitten*, 601 F.3d at 251 (holding that the employer was not entitled to summary judgment on its affirmative defense because "there [was] a question of fact as to whether [it] acted reasonably" in response to the plaintiff's complaints of sexual harassment).

Indeed, in *Faragher* itself, the plaintiff still would have prevailed on her claims even if her harassers had not been deemed supervisors, thus requiring the plaintiff to prove the city's negligence. As this Court concluded, "as a matter of law . . . [,] the [defendant] City could not be found to have exercised reasonable care to prevent the supervisors' harassing conduct." 524 U.S. at 808.

3. To be sure, the burden of proving the employer's negligence is not insignificant in comparison to the plaintiff's burden in an automatic-liability regime. Instead of showing that the harasser was a "supervisor" and that actionable harassment occurred, the plaintiff must show that the employer failed reasonably to detect and stop the harassment.

But whatever the cost of returning to plaintiffs the burden of proving negligence in cases at the margin, that cost ultimately is outweighed by the prophylactic benefits of using the First, Seventh, and Eighth Circuits' bright-line definition of "supervisor." Again, adopting this definition will not let negligent employers off the hook for workplace harassment by employees who are not technically "supervisors." Moreover, adopting this definition will not, as the United States warns, "leav[e] workers vulnerable to harassment" by giving employers incentive to "attempt to insulate themselves from vicarious liability by confining the authority to effect tangible employment actions to a decentralized personnel department" that "might be off site, and might have indirect or infrequent contact with potential victims." U.S. Br. 24. An employer arguably would fail to meet the minimum negligence standard if it intentionally structured its business in a way that kept it willfully blind of workplace harassment or made it more difficult for employees to

file grievances. *See, e.g.*, *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 320 (4th Cir. 2008) (concluding that a jury reasonably could conclude the employer was negligent in preventing the harassment because it "was practicing something akin to willful blindness").

And, it makes sense that a plaintiff should have to meet a more rigorous definition of "supervisor" before triggering "the more stringent standard of vicarious liability," *Ellerth*, 524 U.S. at 759—particularly when all the plaintiff needs to prove to trigger this tougher standard is the harassment itself and the harasser's status.

D. The Court's Decision In *Faragher* Does Not Foreclose The Bright-Line Definition

Petitioner and her *amici* contend that the Seventh Circuit's definition of "supervisor" is foreclosed by the Court's decision in *Faragher*. *See* Pet. Br. 19–21; Br. of *Amici Curiae* Nat'l P'ship for Women & Families, et al., 9–10; Br. of *Amici Curiae* Nat'l Emp't Lawyers Ass'n & AARP 12. Petitioner relies on the fact that the *Faragher* Court approved automatic liability for misconduct by one of Faragher's "supervisors," David Silverman, who Petitioner claims lacked "any of the personnel powers the Seventh Circuit rule has held indispensable." Pet. Br. 20.[3] Petitioner is incorrect. *Faragher* does not preclude approval of the bright-line definition of "supervisor" simply because one narrow reading of that decision supports a definition of "supervisor" that includes employees with authority over the plaintiff's daily work activities.

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[3] The United States espouses a similar view. U.S. Br. 14 ("The court of appeals' restrictive approach cannot be squared with this Court's resolution of the specific claims in *Faragher*.").

As a factual matter, Silverman was "responsible for making lifeguards' daily assignments, and for supervising their work and fitness training." *Faragher*, 524 U.S. at 781. To be sure, the Court referred to Silverman at least once as Faragher's "supervisor[]." *Id.* at 808. And the Court observed that Silverman "directly controll[ed] and supervis[ed] all aspects of Faragher's day-to-day activities"—albeit in the context of its determination that Silverman had contributed to an "actionable" hostile work environment. *Id.* (internal quotation marks omitted).

Nevertheless, in neither *Faragher* nor *Ellerth* did the Court directly "answer the question, 'who is a supervisor?'" *Joens*, 354 F.3d at 940. The definition of "supervisor" was not among the questions presented in those cases.[4] More importantly, the parties in *Faragher* never disputed Silverman's "supervisor" status before this Court. *See* Brief for Respondent City of Boca Raton at 5, *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (No. 97-282), 1998 WL 32487 ("As lieutenant and later as captain, Silverman supervised the lifeguards' daily duties, including designating work assignments and supervising physical fitness routines."); *id.* at 19 ("Neither Terry nor Silverman made any use of his supervisory authority to assist or facilitate his wrongful conduct."); *id.* at 34 ("[P]etitioner seeks to impose liabil-

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[4] *See generally* Petition for Writ of Certiorari at i, *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (No. 97-282), 1997 WL 33485651 (listing the two questions presented); Petition for Writ of Certiorari at i, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) (No. 97-569), 1997 WL 33485655 (similar).

ity on the City solely on the ground that Terry and Silverman were supervisors.").[6]

At bottom, whether Silverman qualified as a "supervisor," and the true meaning of that term, were "'[q]uestions which merely lurk[ed] in the record, neither brought to the attention of the court nor ruled upon.'" *Cooper Indus.*, 543 U.S. at 170 (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)). These questions should not now "'be considered as having been so decided as to constitute precedents.'" *Id.*

The Court is thus free to decide the issue in this case. It should take the opportunity to approve a definition of "supervisor" that truly promotes Title VII's "primary objective" of "avoid[ing] harm"—the bright-line definition adopted by the First, Seventh, and Eighth Circuits.

II. IF THE COURT REJECTS THE BRIGHT-LINE DEFINITION OF "SUPERVISOR," IT SHOULD IMPOSE MEANINGFUL AND WORKABLE LIMITS ON THE THRESHOLD FOR AUTOMATIC LIABILITY

If the Court rejects the bright-line definition of "supervisor" in favor of one that includes employees who oversee the plaintiff's daily work activities, it should, as Respondent argues, Resp. Br. 31–37,

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[6] Nor did the defendant City contest the district court's finding that Silverman was Faragher's "supervisor," *see Faragher v. City of Boca Raton*, 864 F. Supp. 1552, 1558, 1565 (S.D. Fla. 1994), when on appeal before the Eleventh Circuit. *See generally Faragher v. City of Boca Raton*, 111 F.3d 1530, 1534 (11th Cir. 1997) (en banc), *rev'd*, 524 U.S. 775 (1998); *Faragher v. City of Boca Raton*, 76 F.3d 1155, 1164 & n.9 (11th Cir. 1996).

impose meaningful and workable limits on the extent to which harassment by so-called "supervisors" can trigger automatic liability.

For example, the harasser's mere oversight of the plaintiff's daily work activities should still be insufficient to transform him or her into a "supervisor" for purposes of automatic liability under Title VII. Instead, the harasser should be required to wield the power to increase the plaintiff's workload beyond normal limits, or to assign duties that the employer knows or should know are undesirable to the plaintiff. *Cf.* Resp. Br. 29; *CRST Van Expedited, Inc.*, 679 F.3d at 684 (harasser not a supervisor absent evidence that he or she had "the power to do anything more than assign a[n] [employee] to specific tasks already within that [employee's] normal, day-to-day duties"). An employer who deliberately entrusts an employee with the power objectively to worsen the workload of subordinates can reasonably anticipate that an employee might abuse that power. Thus, an employer that gives an employee this power in effect assumes the risk of automatic liability—and, *knowing* that risk, can take affirmative steps to prevent any harassment from happening.

Relatedly, plaintiffs should be required to prove more than just that actionable harassment occurred and that the harasser was a "supervisor" before saddling employers with automatic liability. Consistent with traditional notions of proximate causation, plaintiffs should be required to show a substantial nexus between the supervisor's power to worsen the plaintiffs' workload and the actionable harassment. For example, plaintiffs should have to show that they at least were subjectively aware of their supervisor's authority at the time the alleged harassment

occurred. Resp. Br. 35–36. If a plaintiff does not "underst[and]" the supervisor to be "clothed with the employer's authority," the supervisor's allegedly harassing conduct cannot possibly have the "threatening character" necessary to "aid[]" actionable harassment. *Ellerth*, 524 U.S. at 763 (citation and internal quotation marks omitted). Similarly, harassment that occurs at a time when the harasser does not have authority over the plaintiff's daily work activities definitively cannot "aid" the harassment. Resp. Br. 37; *see also* U.S. Br. 28. There ultimately must be "something more" between the "supervisor" and the plaintiff than just "[p]roximity and regular contact," otherwise "an employer would be subject to vicarious liability . . . for all co-worker harassment" simply because of "the employment relation itself." *Ellerth*, 524 U.S. at 760.

And, the harasser's job title or job description should not be determinative (even if it is probative) of the harasser's legal status as a "supervisor." Resp. Br. 31–32; *see also Noviello*, 398 F.3d at 95 ("[C]ourts must distinguish employees who are supervisors merely as a function of nomenclature from those who are entrusted with actual supervisory powers." (internal quotation marks omitted)); *Parkins*, 163 F.3d at 1038 ("[N]omenclature is not dispositive of the issue.").

At bottom, by rejecting the bright-line definition adopted by the First, Seventh, and Eighth Circuits, the Court would forfeit the substantial preventative benefits afforded by that definition, while simultaneously increasing the likelihood of "supervisor" false positives. Embracing the limitations discussed above, as well as the others raised by Respondent,

would help to curb employers' exposure to the inequitable imposition of automatic liability.

III. PETITIONER'S CLAIMS FAIL UNDER ANY DEFINITION OF "SUPERVISOR"

No matter which definition of "supervisor" the Court ultimately adopts, Petitioner cannot prevail on her supervisor liability claim here because her alleged harasser, Saundra Davis, does not qualify as a "supervisor" under any standard.

First, Petitioner fails to satisfy the bright-line definition of "supervisor"—and indeed makes no effort to do so. *See generally* Pet. Br. 42–45. Petitioner does not challenge the Seventh Circuit's conclusion, based on the summary-judgment record, that she did not "reveal[] a factual dispute regarding Davis's status by asserting that Davis had the authority to tell her what to do or that she [Davis] did not clock-in like other hourly employees." *Vance*, 646 F.3d at 470 (Pet. App. 13a).

Second, as Respondent and the United States both amply explain, Petitioner also fails to satisfy the open-ended definitions of "supervisor," applied by the EEOC and some circuit courts, because she has not shown that Davis had any authority over her daily work activities that could materially have aided the alleged harassment. Resp. Br. 39–46; U.S. Br. 30–32.

Petitioner highlights several purported indicia of Davis's "supervisor" status that, neither alone nor collectively, establish that Davis had anything more than some minimal level of authority over her. Although Petitioner never testified that Davis actually exercised authority over her daily work activities, J.A. 102–248, she vaguely claims that Davis, a "Catering Specialist," "was given authority to direct

[her] and other employees' work." Pet. Br. 6. Petitioner further marshals Davis's "formal [job] description," which briefly referenced "leadership" of certain employees; complaint forms Petitioner filed with the University, in which she herself referred to Davis as a "supervisor" who had "delegat[ed] jobs to her in the kitchen"; and generic statements by other employees characterizing Davis as a "supervisor" who had the authority to "direct[] and l[ead] *** [*a*]*t time*s." Pet. Br. 9–11 (emphasis added); *see also id.* at 42–43. Petitioner also points to some evidence that Davis gave her daily "prep sheets," yet not to any evidence that *Davis* created those sheets. Pet. Br. 10.

Beyond simply invoking these indicia, Petitioner does not connect the oblique references to "supervision," "delegation," "direction," and "leadership" to instances when Davis ever actually had, let alone exercised, the power to dictate Petitioner's day-to-day work activities. More importantly, Petitioner fails to show how, if at all, these general dimensions of Davis's job somehow *materially aided* her alleged harassment of Petitioner. *See* EEOC Guidance, Pet. App. 91a (supervisor status appropriate when the harasser's "ability to commit harassment is enhanced by his or her authority to increase the employee's workload or assign undesirable tasks"); *Mack*, 326 F.3d at 125 (the harasser's authority must "enable[] . . . or materially augment[] his or her ability[] to create or maintain the hostile work environment"). Simply put, Petitioner fails to establish the very essence of the "aided-by-agency-relation principle" that justifies imposing automatic liability on employers. *Faragher*, 524 U.S. at 802.

For this reason, even if the Court adopts something other than the bright-line definition advanced herein, the Court can decide this case without remanding for further proceedings. Resp. Br. 50–54. Indeed, the Court should decide this case now, on the current record, because doing so would provide ascertainable limits applicable to future cases—a result beneficial not only to courts and litigants, but also to employers seeking to comply with Title VII.

CONCLUSION

The judgment of the Seventh Circuit should be affirmed.

Respectfully submitted,

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October 26, 2012

AMICUS CURIAE BRIEF

No. 11-556

IN THE

Supreme Court of the United States

MAETTA VANCE,

Petitioner,

v.

BALL STATE UNIVERSITY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

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IN THE

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No. 11-556

MAETTA VANCE,
Petitioner,

v.

BALL STATE UNIVERSITY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

The Equal Employment Advisory Council (EEAC) respectfully submits this brief as *amicus curiae*. The brief supports the Respondent before this Court in favor of affirmance.[1]

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes approximately 300 major U.S. corporations that collectively provide employment to roughly 20 million workers. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, as well as other equal employment statutes and regulations. As employers, and as potential respondents to employment discrimination claims, EEAC's members have a strong interest in the issue presented for the Court's consideration regarding the appropriate legal standards for determining who is a supervisor for Title VII vicarious liability purposes.

Since 1976, EEAC has participated in numerous cases in this Court raising substantive and procedural issues related to litigation of employment discrimination claims, including the proper interpretation and application of Title VII in the context of

hostile work environment claims.[2] Because of its experience in these matters, EEAC is well-situated to brief the Court on the concerns of the business community and the significance of this case to employers in particular.

STATEMENT OF THE CASE

This case arises from the allegations by Petitioner Maetta Vance that four fellow employees of Ball State University—Saundra Davis, Connie McVicker, Karen Adkins, and Bill Kimes—subjected her to unlawful race harassment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* Pet. App. 28a.

Vance worked at Ball State University from 1989 until her termination in 2009,[3] most recently as a full-time catering assistant in the Banquet and Catering Department of University Dining Services. Pet. App. 27a. During the relevant timeframe, Vance was the only African-American employee in her department. Pet. App. 1a. In 2005, Vance complained that she was threatened by a co-worker, Saundra Davis, and that another employee, Connie McVicker, directed racially offensive language towards her and other African-Americans. Pet. App. 29a-32a. The University investigated and issued McVicker a writ-

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[2] *See, e.g., Pa. State Police v. Suders*, 542 U.S. 129 (2004); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Oncale v. Sundowner Offshore Svcs., Inc.*, 523 U.S. 75 (1998); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

[3] Respondent states that Vance was terminated after telling a co-worker that she "needed to get a .380 rifle and kill" Respondent's Director of Employee Relations. Vance's discharge is not an issue in this proceeding. Brief for Respondent, at 6.

ten warning. Pet. App. 34a. It could not confirm the allegations against Davis. Pet. App. 31a.

Vance claimed that she continued to suffer harassment at the hands of McVicker and Davis. She also claimed that Karen Adkins and Bill Kimes engaged in various other discrete acts contributing to the hostile work environment. Vance eventually sued Ball State for unlawful Title VII harassment and retaliation. Pet. App. 2a.

The district court examined the conduct of each of the four individuals implicated in the complaint. As to Adkins and Kimes, who it is undisputed are supervisors, the district court found their alleged harassing conduct isolated and insufficient to create a hostile work environment. Pet. App. 55a-59a. As to McVicker, whom Vance also agrees is not a supervisor, the district court found her conduct to be offensive and unacceptable, but nevertheless insufficiently severe or pervasive to create an objectionably hostile working environment. Pet. App. 61a-68a. Further, the district court noted that Vance had not established a basis for employer liability as to the conduct of McVicker, because Ball State, after learning of McVicker's conduct, acted promptly to address the misconduct. *Id.* Consequently, the district court held that the steps taken by the employer were reasonably calculated to foreclose subsequent harassment. *Id.*

The parties dispute whether Davis is a supervisor or co-worker. Pet. App. 53a. The evidence that Davis might be a supervisor came from Vance's assertion that Davis "is part of management because she doesn't clock in." Pet. App. 54a. However, Vance also stated that "she does not actually know whether Ms. Davis is one of her managers because 'one day she's a

supervisor, one day she's not. One day she's to tell people what to do, and one day she's not. It's inconsistent.'" *Id.* In spite of the slim evidence of supervisory duties, the district court did not definitively resolve the question, finding that "[e]ven assuming ... Davis periodically had authority to direct the work of other employees, such power would still not be sufficient to establish a supervisory relationship for the purpose of Title VII ...." *Id.*

Seventh Circuit precedent, the district court pointed out, states that "[a]n employee merely having authority to oversee aspects of another employee's job performance does not qualify as a supervisor in the Title VII context." *Id.* (citation omitted). Because it found no evidence that "Davis had the ability to 'hire, fire, demote, promote, transfer, or discipline'" Vance, the district court concluded that Ball State could not be held liable on that basis. *Id.* And because Ball State exercised reasonable care to address and correct the complained of conduct, Vance was unable to recover for co-worker harassment under a negligence theory. *Id.*

On appeal, the Seventh Circuit agreed that Vance could not be considered a supervisor, noting that a supervisor "is someone with the power to directly affect the terms and conditions of ... employment" and that "authority 'primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee.'" Pet. App. 12a. Vance petitioned for a writ of certiorari, which this Court granted on June 25, 2012. *Vance v. Ball State Univ.*, 183 L. Ed. 2d 673 (2012).

SUMMARY OF ARGUMENT

This case has been characterized as presenting the choice between a narrow supervisor liability rule—under which an employer cannot be held vicariously liable for workplace harassment unless the perpetrator has express authority to hire, fire, promote, discipline, or transfer an employee—and a broad rule—under which the employer will be vicariously liable if the perpetrator merely has the authority to direct the work of other employees. This Court should reject both extremes.

To ensure that the supervisor liability rule encompasses both individuals with the power to take tangible job actions, as well as those who are not so authorized but who have virtually unchecked authority over their subordinates, this Court should hold that an employer may be vicariously liable for unlawful harassment committed only by those to whom the employer has delegated meaningful and substantial authority over terms and conditions of the victim's employment. Such a rule would serve to protect employees having to endure harassment by bad actors whose conduct is facilitated by their actual authority—if not position and/or title—while at the same time minimizing the risk that employers will be found strictly liable for alleged harassment by virtually any employee with any measure of staff oversight responsibilities.

Regardless of the standard the Court adopts, the judgment of the Seventh Circuit should be affirmed because the conduct alleged is insufficient as a matter of law to rise to the level of actionable Title VII harassment.

ARGUMENT

I. ADOPTION OF THE BROAD SUPERVISOR TEST ENDORSED BY PETITIONER WOULD DRAMATICALLY AND UNREASONABLY EXPAND THE SCOPE OF EMPLOYER VICARIOUS LIABILITY FOR WORKPLACE HARASSMENT UNDER TITLE VII

A. The "Direction Of Work Activities" Standard For Determining Who Is A "Supervisor" In The Title VII Context Is Unworkable And Is Inconsistent With This Court's Well-Established Title VII Jurisprudence

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, prohibits discrimination, including harassment, on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1). This Court long has held that Title VII also "affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult" on the basis of any Title VII-protected characteristic. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65-66 (1986); *see also Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 (2002). Indeed, in extending the statute's prohibition to the sexual harassment context, the Court in *Meritor* noted that several lower courts had "applied this principle to harassment based on race, religion, and national origin." 477 U.S. at 66 (citations omitted). Citing favorably to the Fifth Circuit's ruling in *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), it observed:

> [The] phrase 'terms, conditions or privileges of employment" in [Title VII] is an expansive

> concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers.

Id. (citations and quotations omitted).

Twelve years later in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), this Court established standards for corporate liability for unlawful workplace harassment perpetrated by supervisors. It held that "an employer is vicariously liable for actionable discrimination caused by a supervisor, but subject to an affirmative defense looking to the reasonableness of the employer's conduct as well as that of a plaintiff victim." *Faragher*, 524 U.S. at 780. Specifically:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer

> had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.

Id. at 807-08; *see also Ellerth*, 524 U.S. at 765.

Thus, under both *Faragher* and *Ellerth*, only the actions of "a supervisor with immediate (or successively higher) authority over the employee" can impose vicarious liability on an employer for harassment under Title VII. 524 U.S. at 765. This focus on supervisory action is reinforced by the Court's explanation in *Ellerth* that the affirmative defense is unavailable only "when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Id.*

This Court made clear in *Ellerth* that imposing strict liability on an employer is warranted only when a supervisor exercises his or her authority to make an employment decision that directly affects a subordinate in a tangible, real way. "A tangible employment action in most cases inflicts direct economic harm. As a general proposition, only a supervisor, or other person acting with the authority of the company, can cause this sort of injury .... The

supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control." *Id.* at 762; *see also Meritor*, 477 U.S. at 72 (Congress intended "to place some limits on the acts of employees for which employers under Title VII are to be held responsible").

Because the "direction of work activities" standard proposed by Petitioner would expand considerably the universe of individuals whose conduct may be attributed to the employer for vicarious liability purposes, it stands in direct conflict with sound principles established by this Court in *Meritor*, *Faragher*, and *Ellerth*.

B. The "Direction Of Work Activities" Test Improperly Blurs The Line Between Supervisors And Non-Supervisors And Thus Is Of Little, If Any, Practical Value

Petitioner has endorsed a broad formulation of the supervisory liability rule, Brief for Petitioner, at 45, which will trigger vicarious liability based not only on the ability of an employee to take a tangible job action, but also on the ability of an employee to direct the work activities of other employees.

In *Mack v. Otis Elevator Co.*, 326 F.3d 116 (2d. Cir. 2003), the Second Circuit considered allegations by an elevator mechanics' helper that her employer was vicariously liable for the hostile work environment created by the actions of James Connolly, the mechanic in charge at the office building where they both worked. The Second Circuit observed that "Connolly was the senior employee regularly on site and that ... he had and exercised the authority to

make and oversee the daily work assignments of the mechanics and mechanics' helpers" at the place of employment. 326 F.3d at 127. Thus, even though Connolly did not have the power to hire, fire, demote, promote, transfer, or discipline, the Second Circuit found that he was a "supervisor" as a matter of law for the purposes of imputing liability under Title VII to his employer. *Id.* at 126-27.

In doing so, the Second Circuit declined to adopt the rule articulated by the Seventh Circuit in *Parkins v. Civil Constructors of Ill., Inc.*, 163 F.3d 1027 (7th Cir. 1998), which described supervisory authority as primarily consisting of the "power to hire, fire, demote, promote, transfer, or discipline an employee." 163 F.3d at 1034. The Second Circuit characterized *Parkins* as "focus[ing] on those attributes of an employee that enable him or her to take tangible employment actions with respect to subordinates." *Mack*, 326 F.3d at 126. Dismissing *Parkins* as expressing too narrow a standard, the Second Circuit observed:

> The question in such cases is not whether the employer gave the employee the authority to make economic decisions concerning his or her subordinates. It is, instead, whether the authority given by the employer to the employee *enabled* or materially augmented the ability of the latter to create a hostile work environment for his or her subordinates.

Id. (emphasis added).

The Second Circuit, in *Mack*, cites with approval written enforcement guidance developed and published by the EEOC in 1999, which defines "supervisor" in this context as an individual with "authority

to undertake or recommend tangible employment decisions affecting the employee; *or* ... authority to direct the employee's daily work activities." U.S. Equal Employment Opportunity Comm'n, *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, EEOC Compl. Man. (June 18, 1999).[4] According to the EEOC, even one "who is temporarily authorized to direct another employee's daily work ..." may be deemed a supervisor "during that time period." *Id.*

The purported policy reasons behind the broad rule have raised many questions. As one district court noted, for instance:

> If the true determinant of whether or not an individual is a Title VII "supervisor" is the degree to which the harasser's authority enabled or materially augmented his or her ability to create a hostile work environment and/or restricted the victim's ability or freedom to resist, then why should employers not also be responsible for harassment enabled by indirect or informal grants of authority? For example, seniority, history of performance, perceived favor on the part of management, and the existence of personal relationships with supervisors can all operate to enable a harasser and restrain a victim's actions in response, even where the harasser is not technically the victim's superior.

Browne v. Signal Mountain Nursery, L.P., 286 F. Supp. 2d 904, 915 (E.D. Tenn. 2003). If liability rules are to apply differently depending on whether a harasser is a supervisor, these questions suggest that

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[4] *Available at* http://www.eeoc.gov/policy/docs/harassment.html (last visited Oct. 24, 2012).

the broad rule does not rest on firm ground as a matter of public policy.

Nor does it rest on firm ground as a matter of law. In describing the "aided in the agency relation" standard, this Court in *Ellerth* observed:

> In a sense, most workplace tortfeasors are aided in accompanying their tortuous objective by the existence of the agency relation: Proximity and regular contact may afford a captive pool of potential victims. Were this to satisfy the aided in the agency relation standard, an employer would be subject to vicarious liability not only for all supervisor harassment, but also for all co-worker harassment, a result enforced neither by the EEOC nor any court of appeals to have considered this issue.

Ellerth, 524 U.S. at 760 (citations omitted). If mere employment of the harasser enabled the conduct to occur, perhaps by proximity and regular contact, the Second Circuit's reasoning implies that the employer could be held vicariously liable even for harassment by and among peers, whose "authority" for making workplace decisions may be much more a matter of perception than reality. Yet, *Ellerth* plainly states that "[t]he aided in the agency relationship standard ... requires the existence of something more than the employment relationship itself." *Id.*

The practical problem with an overly broad definition of supervisor in the Title VII context is that it simply does not reflect the realities of today's American workplace. Many workplaces are now designed to be flatter, with fewer levels of management. Work relationships are also more likely to be project-based and collaborative, with different

employees taking leadership roles at different times and on different projects. *See, e.g.*, Raghuram Rajan & Julie Wulf, *The Flattening Firm: Evidence from Panel Data on the Changing Nature of Corporate Hierarchies*, 88 Rev. Econ. & Stat. 759 (Nov. 2006). Employees may direct the work of co-workers on one project and in turn be directed by those same co-workers on other projects. Direction of some work activities thus is plainly insufficient to determine whether or not an individual is a "supervisor" for Title VII purposes.

As an example of how workplace management styles have changed, consider the issue of performance reviews. The ability of an employee to review a co-worker in the past may have been indicia of supervisory authority. However, today performance reviews are not only undertaken by supervisors, but also by subordinates and even by those outside the company.

As justification for a broad supervisor liability, proponents point out that one of the supervisors responsible for the harassment in *Faragher* had no authority to take tangible employment actions. *See, e.g., Whitten v. Fred's, Inc.*, 601 F.3d 231, 245 n.6 (4th Cir. 2010). Yet the harasser in *Faragher* was "'granted virtually unchecked authority' over [his] subordinates, 'directly controlling and supervising all aspects of [Faragher's] day-to-day activities.' 524 U.S. at 808 (citation omitted). It is also clear that Faragher and her colleagues were 'completely isolated from the City's higher management.'" *Id.* Imposition of the broad rule is not the only viable means of checking the type of unbridled discretion at issue in *Faragher*, however, and in fact would create more confusion that it would resolve.

C. The National Labor Relations Act's Treatment Of The Term "Supervisor" Is Not Instructive

Nor should the Court look beyond Title VII for guidance. Petitioner suggests, incorrectly, that the definition of the term "supervisor" found in the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151 *et seq.*, further supports adoption by this Court of a broad supervisor liability rule in the Title VII context. Brief for Petitioner, at 27-28. Specifically, Petitioner refers to this Court's treatment of the NLRA's definition of "supervisor" with respect to the collective bargaining rights of charge nurses in *N.L.R.B. v. Health Care & Retirement Corp. of America*, 511 U.S. 571 (1994) and *N.L.R.B. v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001). However, these cases are singularly unhelpful in defining the term in the Title VII context.

In contrast to Title VII, which does not define the term, the NLRA expressly defines a supervisor as:

> Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in conjunction with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11). The term is very important in the administration of the NLRA because supervisors are excluded from many of the Act's protections. Supervisors have no right, for instance, to collectively

bargain and cannot strike or engage in other protected concerted activity.[5] The policy reasons for excluding supervisors from NLRA coverage are many, not the least of which is that Congress did not want pro-management supervisors in the same bargaining unit with rank and file employees. Such a practice would allow management to spy on union meetings or, conversely, would make it difficult, if not impossible, for management to compel supervisors to remain loyal to the company in a labor dispute—a task that would be impossible if the supervisor were subject to union discipline. Those considerations have no bearing on the question of vicarious liability under Title VII and this Court therefore should reject Petitioner's contrary suggestion.

II. VICARIOUS LIABILITY FOR WORKPLACE HARASSMENT SHOULD BE LIMITED TO THE UNLAWFUL ACTIONS OF THOSE TO WHOM THE EMPLOYER HAS DELEGATED SUBSTANTIAL AND MEANINGFUL CONTROL OVER THE TERMS AND CONDITIONS OF AN INDIVIDUAL'S EMPLOYMENT

The broad rule Petitioner advances is both impractical and inconsistent with Title VII jurisprudence. Interpreting supervisory status to include those to whom the employer has delegated substantial and meaningful control over the terms and conditions of

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[5] *See N.L.R.B. v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 572-73 (1994) ("The National Labor Relations Act (Act) affords employees the rights to organize and to engage in collective bargaining free from employer interference. The Act does not grant those rights to supervisory employees, however, so the statutory definition of supervisor becomes essential in determining which employees are covered by the Act").

employment of others, however, would effectuate the objectives of Title VII without blurring the line between supervisor and non-supervisor so much as to be of no practical value whatsoever.

As the Seventh Circuit observed in *Parkins*:

> [I]t is manifest that the essence of supervisory status is the authority to affect the terms and conditions of the victim's employment. This authority primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee. Absent an entrustment of at least some of this authority, an employee does not qualify as a supervisor for purposes imputing liability to the employer.

Parkins, 163 F.3d at 1034.[6]

Adopting a "substantial and meaningful control" test would ensure that vicarious liability is triggered in appropriate cases without unduly broadening the definition and rendering meaningless the distinction between supervisory and non-supervisory workers. Consider, for example, application of such a rule to the facts of two cases decided in circuits using broad rules: *Mack v. Otis Elevator*, 326 F.3d 116 (2d Cir. 2003), and *Whitten v. Fred's, Inc.*, 601 F.3d 231 (4th Cir. 2010). In *Mack*, the harasser directed the par-

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[6] The rule announced by the *Parkins* court was consistent with this Court's decisions in *Faragher* and *Ellerth*. However, the Seventh Circuit's application of the *Parkins* rule has changed further over time and now appears to require that an individual have the power to directly hire, fire, promote, demote, discipline or transfer a subordinate employee in order to qualify as a supervisor. *See, e.g., Rhodes v. Ill. Dep't of Transp.*, 359 F.3d 498, 506 (7th Cir. 2004); *Hall v. Bodine Elec. Co.*, 276 F.3d 345, 355 (7th Cir. 2002).

ticulars of each of Mack's work days and was the senior employee on the work site. 326 F.3d 116, 127 (2d Cir. 2003). Mack and her co-workers did not have regular access to more senior employees. *Id.* at 125. In *Whitten*, the harasser was a store manager who was usually the most senior employee present in the store. He directed daily activities, controlled the victim's schedule, and possessed and actually exercised the authority to discipline Whitten by giving her unfavorable assignments and work schedules. As noted by the Fourth Circuit, the harasser "had power and authority that made Whitten vulnerable to his conduct 'in ways that comparable conduct by a mere co-worker would not.'" 601 F.3d at 246 (citation omitted).

The unifying theme in *Mack* and *Whitten* is not merely that the harassers could direct some work activities of the victims. It is that, although they did not have the power to implement tangible job actions, the harassers were delegated virtually unchecked authority over their subordinates and that the subordinates were insulated from others in management. This gave them the power to meaningfully and substantially impact their victims' terms and conditions of employment.

This Court should hold that the supervisor liability rule announced in *Faragher* and *Ellerth* does not apply when an employee merely directs some daily activities of another employee, but instead requires meaningful and substantial control over subordinate employees' terms and conditions of work. Such a rule would serve to protect employees from having to endure harassment by bad actors whose conduct is facilitated by their actual authority while minimizing the risk that employers will be found strictly liable

for alleged harassment by virtually any employee with any measure of oversight responsibilities.

CONCLUSION

Accordingly, the *amicus curiae* Equal Employment Advisory Council respectfully requests that the decision of the court below be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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MAETTA VANCE, *Petitioner*,
v.
BALL STATE UNIVERSITY, ET AL., *Respondents*.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH
CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND AARP IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

The *Amici*[1] are committed to furthering the goals of Title VII of the Civil Rights Act of 1964 to eradicate employment discrimination and in that interest, to encourage employers to develop and implement policies prohibiting discrimination in employment, specifically policies aimed at protecting employees from harassment on the job.

The Court's decision as to what level of supervisory authority may impose liability on an employer for unlawful workplace harassment, consistent with the Court's decisions in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Indus., Inc., v. Ellerth*, 524 U.S. 742 (1998), will further clarify the scope of Title VII's power to combat illegal discrimination. The decision will directly affect the rights of employees who suffer harassment on their jobs based upon race, sex, religion, national origin, or ethnicity. *Amici* ask this Court to hold that the Equal Employment Opportunity Commission's definition of supervisor is the controlling one under Title VII.

The National Employment Lawyers Association (NELA) and AARP are organizations dedicated to ensuring Congress' goal that workers have both the right to a discrimination-free work environment, as well as effective procedures for the

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[1] Pursuant to Sup. Ct. R. 37.6, *Amici* submit that no counsel for any party participated in the authoring of this document, in whole or in part. In addition, no other person or entity, other than *Amici*, has made any monetary contribution to the preparation and submission of this document. Pursuant to Sup. Ct. R. 37.2, letters consenting to the filing of this Brief have been filed with the Clerk of the Court.

enforcement of this right. In furtherance of this goal and consistent with Congress' intent and this Court's prior interpretations, the *Amici* fulfill the role of private attorneys general by assisting in the enforcement of these laws. *EEOC v. Associated Dry Goods*, 449 U.S. 590, 602 (1980). *See N.Y. Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63 (1980) ("Congress has cast the Title VII plaintiff in the role of a 'private attorney general,' vindicating a policy 'of the highest priority' . . .").

NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. Founded in 1985, NELA is the country's largest professional organization comprised exclusively of lawyers who represent individual employees in cases involving labor, employment and civil rights disputes. NELA and its 68 circuit, state and local affiliates have more than 3,000 members nationwide committed to working for those who have been illegally mistreated in the workplace.

AARP is a nonpartisan, nonprofit organization with a membership. AARP helps people age 50+ have independence, choice and control in ways that are beneficial and affordable to them and society as a whole. A significant share of AARP's members are in the work force and are protected by Title VII of the Civil Rights Act of 1964, as well as by other civil rights laws at the federal, state, and municipal level in regard to which legislatures, courts, and enforcement agencies look to Title VII as a model. AARP supports the rights of older workers, including the right to be free from discriminatory harassment on grounds of sex, race, color, national origin, and religion, under Title VII, as well as on grounds of

age, under the Age Discrimination in Employment Act, and on grounds of disability, under the Americans with Disabilities Act and the Rehabilitation Act. By various means, including legal advocacy, AARP strives to preserve and enforce these rights, including those of older women, older persons of color, and other vulnerable groups of older persons.

SUMMARY OF ARGUMENT

Through a consistent line of cases, the Court has provided the analytical framework for determining when an employer can be held vicariously liable for harassment by one of its employees, and when that employee may be considered a supervisor. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Burlington Indus., Inc., v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). This analysis applies general agency principles as directed by Congress, but balances these principles with Title VII's purpose. Congress intended Title VII to encourage employers to develop policies to prevent and address workplace harassment, and to promote employee use of these policies to address discrimination, rather than resorting to the federal courts.

The focal question in determining employer liability for employee harassment is what level of authority the harasser must possess to be considered a supervisor. If the employee is vested with supervisory power, and the use of that power results in a "tangible employment action," the employer is strictly liable. However, if the harassment does not

result in a "tangible employment action," the employer may be liable, but has an affirmative defense. *Pennsylvania State Police v. Suders*, 542 U.S. 129, 143 (2004) (citing *Faragher*, 524 U.S. at 807-08; *Ellerth*, 524 U.S. at 765). The Court understood that employer liability should be assessed by the power of an employee to control the activities of other employees, not necessarily just to take tangible employment actions.

The Guidance issued by the Equal Employment Opportunity Commission (EEOC), mirrors the Court's analysis, imputing liability to the employer when "the individual has authority to undertake or recommend tangible employment decisions affecting the employee; or . . . has authority to direct the employee's daily work activities." Equal Emp't Opportunity Comm'n, Enforcement Guidance: Vicarious Employer Liab. for Unlawful Harassment by Supervisors, pt. III.A. (1999) (1999 WL 33305874) [hereinafter the "EEOC Guidance"].[2] The circuit courts are split in their definition of "supervisor." Some courts, including the Seventh Circuit, unreasonably restrict the definition of "supervisor" as only those with the power to make tangible employment decisions.

The EEOC Guidance holds employers responsible for delegating power to employees to

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[2] While Vance is stating a claim pursuant to Title VII for race discrimination, the EEOC Guidance encompasses all statutory bases for protection against harassment within EEOC's jurisdiction, including age pursuant to the Age Discrimination in Employment Act (29 U.S.C. § 621, *et seq.*), and disabilities pursuant to the Americans with Disabilities Act (42 U.S.C. § 12101 *et seq.*). *See* EEOC Guidance, Purpose.

make tangible employment decisions, and also when the employer delegates to the employee the power to direct other employees' day-to-day activities. The EEOC Guidance is entitled to deference because this interpretation is driven by, and consistent with, the Court's decisions in *Meritor*, *Faragher*, *Ellerth*, *Suders*, and *Staub v. Proctor Hospital*, 131 S.Ct. 1186 (2011). Additionally, the EEOC Guidance recognizes and reflects workplace reality. Application of the EEOC Guidance will not increase employer liability, but will encourage employers to police workplace harassment, and provides an affirmative defense to liability if they do.

ARGUMENT

Building on *Meritor* as a "foundation," *Faragher* and *Ellerth* further refined legal standards for when an employer is liable for workplace harassment by a supervisor. *Faragher*, 524 U.S. at 992; *Ellerth*, 524 U.S. at 761-65. [3] While the Court did not define how much supervisory authority an employee must possess before the employer is liable for that employee's workplace harassment, the Court's analysis, which outlines the reach of vicarious liability, provides a roadmap for answering this question. The EEOC merely followed this roadmap when it issued guidance defining the appropriateness of imputing

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[3] If the harassing party is a victim's co-worker, then the employer will be liable if it acts with negligence in that it knew of or should have known of the harassment and failed to take preventative measures. *Ellerth*, 524 U.S. at 758-59 (citing RESTATEMENT (SECOND) OF AGENCY § 219(2)(b)). *Faragher*, 524 U.S. at 789.

an employee's harassment to the employer under Title VII.

I. The EEOC Guidance Mirrors the Court's Analysis of this Issue and Adopts a Sound Definition of Supervisory Authority

In direct response to, and consistent with the Court's decisions in *Faragher* and *Ellerth*, the EEOC defined "supervisor" in its 1999 Enforcement Guidance. *See* the EEOC Guidance.[4] A mooring for the EEOC Guidance is the Court's recognition that imposing liability on the employer is appropriate because supervisors, even those acting outside the scope of their employment, are aided in their harassment by the authority that the employer has delegated to them. EEOC Guidance n.20 (citing *Faragher*, 524 U.S. at 801; *Ellerth*, 524 U.S. at 761-62).

Significantly, the EEOC Guidance explains the nature of the power that must be given to an employee before he or she can effectively qualify as a supervisor and exercise supervisory authority sufficient to hold the employer liable. The employee's authority must be of "sufficient magnitude to assist the harasser explicitly or implicitly in carrying out the harassment." *Id.* at pt. III.A.

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[4] The Court in *Ellerth*, when referencing the 1990 EEOC Sexual Harassment Guidelines, noted that the EEOC "provide[d] little guidance on the issue of employer liability for supervisor harassment." *Ellerth* 524 U.S. at 755. The EEOC filled this void through their 1999 EEOC Guidance on vicarious liability.

The EEOC Guidance further explains that the status of "supervisor" depends on whether the alleged supervisor is "in [the employee's] supervisory chain of command." *Id.* at pt. III.B. This definition simply reiterates the Court's view that "[a]n employer is subject to vicarious liability for a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

If the alleged supervisor is in the employee's chain of command, then he or she is a supervisor if either "the individual has authority to undertake or recommend tangible employment decisions affecting the employee" or "the individual has authority to direct the employee's daily work activities." EEOC Guidance at pt. III.A.1., A.2.[5] An individual who is "temporarily authorized" to direct an employee's activities is also a supervisor. *Id.* at pt. III.A.2.

Furthermore, the EEOC Guidance explains when power delegated to a co-worker does not reasonably make that person a supervisor. For example, an individual who "merely relays" work assignments from others or who "directs only a limited number of tasks or assignments" is not considered a supervisor. *Id.* at pt. III.A.2.

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[5] The EEOC Guidance provides that an individual outside the employee's chain of command will be deemed a supervisor only if the subordinate employee has a "reasonable belief" that that individual is a supervisor. *Id.* at pt. III.B.

Consistent with the EEOC Guidance, all circuit courts that have addressed this issue agree that if an individual has authority to make tangible employment decisions,[6] then the individual will be considered a supervisor for the purpose of imputing liability to the employer.[7] Although the legal basis for the "ability to direct" prong of the EEOC Guidance is the same as for the "tangible job benefit" prong, not all courts agree that an individual who has the authority to direct the employee's daily work activities should also be viewed as that employee's supervisor for purposes of imputing liability under Title VII.[8] This needlessly narrow view of when an

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[6] The EEOC Guidance applies *Ellerth* by defining a tangible employment decision as "a significant change in employment status." *See* EEOC Guidance at pt. IV.B. for the factors that characterize a tangible action. *See Ellerth*, 524 U.S. at 761 (A tangible employment action "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.") The Court elaborated that a tangible employment action is one "by which the supervisor brings the official power of the enterprise to bear on subordinates." *Accord* EEOC Guidance at pt. IV.B.1.

[7] *See Noviello v. City of Boston*, 398 F.3d 76 (1st Cir. 2005); *Mack v. Otis Elevator Co.*, 326 F.3d 116 (2d Cir. 2003); *Griffin v. Harrisburg Property Servs. Inc.*, 421 Fed.Appx. 204 (3d Cir. 2011) (unpublished); *Whitten v. Fred's Inc.*, 601 F.3d 231 (4th Cir. 2010); *Stevens v. U.S. Postal Serv.*, 21 Fed.Appx. 261 (6th Cir. 2001) (unpublished); *Hall v. Bodine Electric Co.*, 276 F.3d 345 (7th Cir. 2002); *Weyers v. Lear Operations Corp.*, 359 F.3d 1049 (8th Cir. 2004); *Dawson v. Entek Int'l*, 630 F.3d 928 (9th Cir. 2011); *Smith v. City of Oklahoma City*, 64 Fed.Appx. 122 (10th Cir. 2003) (unpublished).

[8] *See, e.g., Parkins v. Civil Constructors of Ill., Inc.* 163 F.3d 1027 (7th Cir. 1998); *Hall v. Bodine Elec. Co.*, 276 F.3d 345 (7th Cir. 2002); *Griffin v. Harrisburg Prop. Servs., Inc.*, 421

individual acts as supervisor is inconsistent with the language of the statute and ignores how the Court has approached this issue.

A. The EEOC's Definition Of "Supervisor" Is Compelled By The Supreme Court's Rationale In *Faragher* and *Ellerth*

In *Faragher* and *Ellerth*, the Supreme Court analyzed whether, and to what extent, a corporate employer is liable for the sexual harassment of employees by their supervisors. These cases provide guidance on defining the term "supervisor" and discuss how much authority the employee must exercise before he or she would be viewed as a supervisor. The EEOC's definition simply builds upon the Court's consistent reasoning and policy behind *Faragher* and *Ellerth*.

Congress "left it to the courts to determine controlling agency law principles in a new and difficult area of federal law." *Ellerth*, 524 U.S. at 751. In keeping with this principle, the *Ellerth* Court balanced Title VII's directive, to "encourage the creation of anti-harassment policies and effective grievance mechanisms" with traditional agency principles. *Id.* at 764.

The Court began this analysis by discussing vicarious liability, citing the Second Restatement of Agency as persuasive. *Id.* at 755; *Faragher,* 524 U.S. at 791-92 (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986)). According to the

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Fed.Appx. 204 (3d Cir. 2011); *Stevens v. U.S. Postal Serv.*, 21 Fed.Appx. 261 (6th Cir. 2001).

Restatement, employers are generally liable for the harasser's action if that action serves the employer's purpose. *Ellerth*, 524 U.S. at 755 (citing RESTATEMENT (SECOND) OF AGENCY § 228(1)(c) (1957)). However, the Court observed that workplace harassment is normally not within the scope of anyone's employment, regardless of whether a supervisor or co-worker committed the harassment.[9] *Id.* at 757.

The Court then turned to Section 219(2) of the Restatement, which imputes liability to the corporation even when the agent is acting outside the scope of his or her employment. Section 219(2) provides that employers are liable for the torts of their servants when the servant "purport[s] to act or to speak on behalf of the principal and there [is] reliance upon apparent authority, or he [is] aided in accomplishing the tort by the existence of the agency relation." *Id.* at 758 (citing RESTATEMENT (SECOND)

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[9] *Faragher* was not as direct on this point, explaining that "a holding that conduct falls within the scope of employment ultimately expresses a conclusion not of fact but of law," which the Court noted has been described by "eminent authority" as a "highly indefinite phrase . devoid of meaning in itself" and "obviously no more than a bare formula to cover the unordered and unauthorized acts of the servant for which it is found to be expedient to charge the master with liability . . . ." *Faragher* at 796 (citing W. Keeton, D. Dobbs, R. Keeton, & Owen, Prosser and Keaton on Law of Torts 502 (5th ed. 1984)). *Faragher* did not directly answer whether sexual harassment was within the scope of employment, however, for the reasons discussed in detail in this brief, the Court found that liability for harassment by a supervisor, even if it did not result in "a tangible employment action" could be imputed to the employer subject to an affirmative defense.

OF AGENCY § 219(2)(d)); *Faragher*, 524 U.S. at 801-03.

The Court explained that "[w]hen a party seeks to impose vicarious liability based on an agent's misuse of delegated authority, the Restatement's aided in the agency relation rule, rather than the apparent authority rule, appears to be the appropriate form of analysis." *Ellerth*, 524 U.S. at 759. [10] *Faragher* reached a similar conclusion: "it makes sense to hold an employer vicariously liable for some tortious conduct of a supervisor made possible by abuse of his supervisory authority, and that the aided-by-agency relation principle embodied in section 219(d)(2) of the Restatement provides an appropriate starting point for determining liability . . . ." *Faragher*, 524 U.S. at 802-04.

The Court's analysis of the "aided by the agency relationship" test demonstrates both the reasonableness and legal soundness of the EEOC Guidance. While the Court did not undertake a fact-

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[10] As defined by the Restatement, "[a]pparent authority exists only to the extent it is reasonable for the third person dealing with the agent to believe that the agent is authorized." *Ellerth*, 524 U.S. at 759 (citing RESTATEMENT (SECOND) OF AGENCY § 8, cmt. c). Therefore, employees with supervisory authority include those who are expressly given supervisory powers and those reasonably perceived to be exercising supervisory power given to them by the principal. The EEOC Guidance addresses the apparent authority issue by providing that an alleged supervisor who is not in the employee's chain of command is still considered a supervisor when the employee "reasonably believe[s] that the harasser ha[s] such power." EEOC Guidance at pt. III.B.

intensive inquiry regarding the defendant-agents' roles in *Faragher* and *Ellerth*, the opinions did discuss certain supervisory traits that the harassers possessed and, more importantly, those that they did not. In *Faragher*, the Court treated both lifeguards who harassed Faragher as supervisors. One of the harassers, Terry, had the power "to supervise all aspects of the lifeguards' work assignments, to engage in counseling, to deliver oral reprimands and to make a record of any such discipline." *Faragher*, 524 U.S. at 781. However, Silverman, the other harasser, only had the power to make the lifeguards' daily assignments, and to supervise their work and fitness training. *See id.* There is no evidence that Silverman was able to make tangible employment decisions, yet the Court considered both to be supervisors, noting they were given "unchecked authority" and were "directly control[ing] and supervis[ing] all aspects of [Faragher's] day-to-day activities." *Id.* at 808.

Similarly, the supervisor in *Ellerth* was not upper-level management, nor did he hold "policy-making" power in the defendant corporation. *Ellerth*, 524 U.S. at 747. Although he interviewed the plaintiff for a promotion, he did not possess the power to promote her himself. *Id.* at 748. The plaintiff and the harassing supervisor also worked out of different offices, and the harasser was not the plaintiff's immediate supervisor. *Id.* at 747. The Court addressed the harasser's authority as perceived by the plaintiff, noting that the plaintiff saw the supervisor as "her boss" and felt compelled to acquiesce in certain matters and to forgo reporting certain misconduct. *Id.* at 748. The Court

recognized in both cases that the ability to direct day-to-day activities is an exercise of supervisory authority and that the employer can be held liable for its misuse. The Court's analysis is precisely the standard adopted by the EEOC.

Faragher and *Ellerth* ultimately decided that, in harassment cases involving a tangible employment action, employers are always liable under general agency principles, as "a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer." *Faragher*, 524 U.S. at 802-03; *Ellerth*, 524 U.S. at 762. The Court conceded, "whether the agency relation aids in the commission of supervisor harassment which does not culminate in a tangible employment action is less obvious." *Ellerth*, 524 U.S. at 763.

The Court explained that the Restatement's "malleable terminology. . . can be read to either expand or limit liability in the context of supervisor harassment." *Id.* On this point, the Court struck a delicate balance regarding instances where liability could be imputed to the employer even in the absence of a tangible employment action, subject to an affirmative defense.[11] This balance applied the agency principles dictated by Congress, but also furthered Title VII's purpose to have employers

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[11] An employer may assert an affirmative defense to liability by demonstrating that it exercised reasonable care to prevent or promptly remedy sexual harassment, and that the employee unreasonably failed to take advantage of any preventative measures offered by the employer. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

develop policies aimed at preventing and remedying workplace discrimination. The EEOC's definition of "supervisor" similarly serves both purposes.

An employee who is given the power to direct another employee's day-to-day activities and uses that authority to harass an employee is functionally the same as a supervisor with hiring and firing power who engages in sexual harassment but does not take a tangible employment action. Both employees are empowered by the employer to "[bring] the official power of the enterprise to bear" in forcing employees to endure the harassment. *Ellerth*, 524 U.S. at 762. In both situations the victim recognizes the real workplace risk of challenging this harassment. These employees are no longer ordinary co-workers because they have been given power by the employer to impact the work environment.

An employee is likely to view the person who assigns her work, oversees her progress, and evaluates her performance (essentially, the person who directs her daily work activities) as duly capable of altering the terms and conditions of her employment. This ability to direct someone's day-to-day activities, much more than the specific power to hire and fire, is the touchstone for determining who constitutes a "supervisor" under Title VII.

> A supervisor's responsibilities do not begin and end with the power to hire, fire, and discipline employees, or with the power to recommend such actions. Rather, a supervisor is charged with the day-to-day supervision of the work

> environment and with ensuring a safe, productive workplace.

Meritor, 477 U.S. at 76 (Marshall, J., concurring).

When an employer gives an employee the power to direct the day-to-day activities of others it is proper to impute the harassing employee's conduct to the employer. This analysis is consistent with the *Faragher* and *Ellerth* standards and is precisely what the EEOC's Guidance provides. A review of a number of cases highlights the functionality of the EEOC's Guidance and demonstrates how a limited focus on an employee's ability to make a tangible employment decision ignores the reality of today's workplace.

For example, in *Mack v. Otis Elevator Co.*, 326 F.3d 116 (2d Cir. 2003), a female elevator mechanic's helper, Mack, brought suit against her employer due to sustained sexual harassment by the union designated mechanic in charge, Connolly. Besides engaging in physical and verbal abuse, Connolly also denied overtime assignments to the plaintiff, even though he did not have the formal title of supervisor. The authority Connolly exerted over Mack "bestowed upon him by Otis, enabled him, or materially augmented his ability to impose a hostile work environment on her. Under the rules established by *Ellerth* and *Faragher*, [he] was therefore Mack's supervisor for purposes of Title VII analysis." *Mack*, 326 F.3d at 125. The court noted that his authority included "direct[ing] the particulars of each of Mack's work days" and he was "the senior employee on the work site." *Id.* Connolly had a "special dominance over other on-site employees, including Mack . . . ." *Id.*

In *Weyers v. Lear Operations, Inc.*, 359 F.3d 1049 (8th Cir. 2004), the 43 year-old plaintiff, Weyers, worked in the defendant's factory. Brosius, her team leader, was the only authority present in her vicinity except for rare visits from other supervisory personnel. The production line employees viewed Brosius as their supervisor as he assigned tasks and was paid more than other production line employees. Weyers was one of several older female employees treated poorly by this team leader. He failed to give Weyers the same station rotation opportunities as other employees and made derogatory remarks about her age. Station rotation allowed employees to receive on-the-job training for different types of tasks. Consequently, Weyers did not get the same skills training as her younger co-workers.

The district court found that the fact that the team leader could not hire, fire, promote, or take other tangible employment action did not necessarily mean that he was not a supervisor since the "real life working environment rather than artificial demarcations of authority" should control the analysis. *Weyers v. Lear Operations Corp.*, 232 F. Supp. 2d. 977, 994 (W.D. Mo. 2002). On review, the Eighth Circuit found that, despite Brosius' use of his authority to sabotage both Weyers' day-to-day life at the factory and her long-term employment prospects by denying her equal training opportunities, Brosius was not a supervisor for purposes of Title VII. *Weyers*, 359 F.3d at 1057. In doing so, however, the Eighth Circuit recognized that its "option of adopting the broader *Mack* definition of supervisory status," comporting with the EEOC Guidelines, "ha[d] been

foreclosed by the recent decision of another panel of" that court. *Id.* at 1056-57.

Finally, in *Whitten v. Fred's, Inc.*, 601 F.3d 231 (4th Cir. 2010), a female employee, Whitten, worked for the defendant for about 10 months before being transferred to a new location. She quit after one weekend at the new location due to unwelcome sexually-charged interactions with the store manager. Although the manager lacked the power to hire, fire, promote, or reassign, he considered Whitten to be his underling, and Whitten similarly believed he was her immediate supervisor. The manager assigned Whitten tasks and required her to keep a notebook of her assigned jobs. He informed Whitten that if she ever went over his head, he would make her life unpleasant. He oversaw Whitten's work throughout the day, critiqued her, and told her when to begin and end tasks. On most days, the manager was the highest authority present at the store. His "authority over Whitten thus aided his harassment of her and enabled him to create a hostile working environment," which the court took into consideration in concluding that a supervisory relationship had existed. *Whitten*, 601 F.3d at 246. Indeed, the court recounted Justice Souter's words from *Faragher*, noting that Whitten clearly "did *not* feel free to tell Green where to go." *Id.* These cases all demonstrate the wisdom of the EEOC's Guidance, reflecting workplace realities rather than attempting to focus narrowly on whether the employee was

given the power to make tangible employment decisions.[12]

In *Meritor*, Justice Marshall stressed an obvious yet important fact: that "it is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates." *Meritor*, 477 U.S. at 77 (Marshall, J., concurring). The same is true when the employer gives an employee the power to direct the day-to-day activities of other employees and that power assists the harasser in carrying out the harassment. *See* EEOC Guidance at pt. III.A.

B. The Court's Public Policy Rationale In *Faragher* And *Ellerth* Further Supports The Adoption Of The EEOC's Definition Of "Supervisor"

In *Faragher* and *Ellerth*, the Court also determined that "tying the liability standard to the

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[12] *See also Mikels v. City of Durham*, 183 F.3d 323, 333 (4th Cir. 1999) (noting that "the determinant (of whether and employee is a supervisor) is whether as a practical matter his employment relation to the victim was such as to constitute a continuing threat to her employment conditions that made her vulnerable to and defenseless against the particular conduct in ways that comparable conduct by a mere co-worker would not"); and *Rhodes v. Ill. Dep't of Transp.*, 359 F.3d 498, 510 (7th Cir. 2004) (Rovner, J., concurring) (criticizing the Seventh Circuit definition of supervisor as too restrictive because "whatever formal employment authority [the harassers] lacked, a fact-finder reasonably might conclude that the power IDOT had given them to manage the Yard on a day-to-day basis enabled or facilitated their ability to create a hostile work environment for Rhodes").

employer's effort to install effective grievance procedures would advance Congress' purpose 'to promote conciliation rather than litigation'" and "could serve Title VII's deterrent purpose by 'encouraging employees to report before it becomes severe or pervasive.'" *Suders*, 542 U.S. at 145. The Court in *Faragher* further explained, "[a]lthough Title VII seeks 'to make persons whole for injuries suffered on account of unlawful employment discrimination' . . . its 'primary objective,' like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm." *Faragher*, 524 U.S. at 805-06 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975)).

Driven by these policies, the Court created an affirmative defense for employers when a supervisor's harassment, while not resulting in a tangible employment action, nevertheless creates a hostile work environment. The first prong of the affirmative defense—that the employer exercised reasonable care to prevent and promptly correct any harassing behavior—motivates employers to implement anti-harassment policies. *Faragher*, 524 U.S. at 806; *Ellerth*, 524 U.S. at 765. By defining "supervisor" to include those individuals who direct employees' daily work activities, the EEOC Guidance encourages employers to implement anti-harassment policies that apply to anyone who can be reasonably viewed as a supervisor.

Whether a person is considered a "supervisor" should be determined in a manner that encourages employers to take proactive steps to remedy existing workplace harassment and to prevent future harassment. The incentive to "avoid harm"—Title

VII's "primary objective"—is thus furthered by the EEOC's Guidance. This objective, expressed in the 1990 EEOC Policy Guidelines on Sexual Harassment, and relied on in *Faragher* and *Ellerth*, is a core part of the 1999 EEOC Guidance.

The 1999 EEOC Guidance also captures the second prong of the affirmative defense: insulating the employer from liability if the aggrieved employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm. *Faragher*, 524 U.S. at 806-07; *Ellerth*, 524 U.S. at 765. The EEOC Guidance respects the Court's desire to encourage employees to address workplace harassment through the procedures adopted by employers to prevent workplace discrimination. *Faragher*, 524 U.S. at 806-07; *Ellerth*, 524 U.S. at 765. "The Supreme Court's rulings in *Faragher* and *Ellerth* create an incentive for employers to implement and enforce strong policies prohibiting harassment and effective complaint procedures [and] an incentive for employees to alert management about harassment before it becomes severe and pervasive." EEOC Guidance at Section VII. It is hard to envision federal guidance more in line with Supreme Court expectations. The *Faragher* and *Ellerth* decisions support an interpretation of "supervisor" consistent with the EEOC's definition, while at the same time protecting those employers who responsibly monitor their corporate climate for harassment.

II. The Court's Analysis In *Staub* Reinforces The EEOC's Definition Of "Supervisor"

The Court's recent decision in *Staub v. Proctor Hospital*, 131 S.Ct 1186 (2011) also supports a definition of "supervisor" that accounts for an employee's power to direct an individual's daily work activities. In *Staub*, the Court held that an employer's liability for a supervisor's actions extends to the actions of individuals without ultimate hiring or firing power in the decision-making chain, so long as they caused the ultimate decision in some manner. *Staub*, 131 S.Ct at 1192-94. The Court thus recognized the reality of the workplace: individuals who may lack the power to fire[13] an employee can still discriminate against an employee. In such circumstances, the employer is accountable for the discrimination.[14]

Staub reinforces the EEOC's definition of "supervisor." The actions of Staub's day-to-day supervisors, who apparently did not have the power to fire him, nevertheless created liability for the

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[13] It is unclear whether the lower ranked employees had the authority to fire Staub. Presumably, if either individual had that authority, the ultimate firing decision would not have been vested in the vice president of human resources who possessed more authority than either of the lower ranked employees. *See Staub*, 131 S.Ct 1186.

[14] Although *Staub* was brought pursuant to 38 U.S.C. § 4301 *et seq.*, the analysis supports the EEOC's definition of supervisor because the Court recognized that individuals who do not take the ultimate adverse action against the employee can still discriminate against the employee. Additionally, the Court did not address the liability of co-workers, and *Staub* did not define "supervisor." This case provides the appropriate vehicle for doing so.

employer. *See id.* at 1191-92. Similarly, the EEOC's definition recognizes that an individual who directs the employee's daily work activities but does not have the ultimate authority to fire the employee, can and should be deemed that employee's supervisor. *See* EEOC Guidance at pt. III.A.2.

Further, the Court expressed concern about a result that would shield the employer from liability if the person who actually fired the employee did not act with discriminatory animus, but was influenced by others who did. *See Staub*, 131 S.Ct. at 1192-93. The Court noted that "[a]n employer's authority to reward, punish, or dismiss is often allocated among multiple agents." *Id.* at 1192. The Court explained that insulating the employer from liability simply because the lower level employee did not have the power to take "adverse employment actions" would "effectively shield" the employer from the "discriminatory acts and recommendations of supervisors . . . ." *Id.* at 1193. The Court concluded that such a result would be an "implausible meaning of the text." *Id.*

Similarly, the EEOC Guidance, by providing that individuals who direct the employee's daily work are "supervisors," helps to ensure that employers who delegate power to employees are held accountable for abuse of that power.

III. *Burlington Northern v. White* Also Reinforces The EEOC's Position That An Employee With The Authority To Direct Day-To-Day Activities Can Be Classified As A "Supervisor"

The focus of the EEOC Guidance on the employee's power to direct the day-to-day activities of other workers is the correct inquiry in determining whether to impute liability to the employer. A question underlying this analysis is: how much power must the employer delegate to conclude that the supervising employee has the authority to direct the day-to-day activities of others? The Court does not need to break new ground here because it has provided a workable test, the "material adversity" analysis, in *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). If the power delegated to an employee is sufficient to deter another employee from challenging workplace harassment, that delegation of authority should be enough to impute liability under the theory adopted by the Court in *Faragher* and *Ellerth*.

While *White* addressed this issue in the context of retaliation, the principles involved in the "material adversity" analysis are directly transferable to the harassment context. As in a retaliation analysis, it is appropriate to examine whether an employee's level of control can aid in creating a hostile work environment. In *Faragher* and *Ellerth*, the Court repeatedly recognized that a significant factor in holding employers liable for a supervisor's harassment, even absent a tangible employment action, is the ability of the harassing employee to exact punishment if the victim does not

submit to the harassing conduct. *See Faragher*, 524 U.S. at 805; *Ellerth*, 524 U.S. at 763-64. In *Faragher*, the Court expressed concern that the inherent power discrepancy between a supervisor and a subordinate employee may, itself, compel the employee to tolerate harassing conduct because of fear of reprisal. The Court explained that "[s]upervisors do not make speeches threatening sanctions whenever they make requests in the legitimate exercise of managerial authority, and yet every subordinate employee knows the sanctions exist." *Faragher*, 524 U.S. at 805.

This same fear of retaliation is present when the employer has given a co-worker the power to direct an employee's day-to-day activities even if that grant of power does not include the authority to take tangible employment actions. If a co-worker has the power to direct the day-to-day activities of another, there is little likelihood that the subordinate employee will simply ignore this direction or "walk away or tell the offender where to go" if they are subject to harassment by that employee. *Id.* at 803.

The Court made it clear that it is the quantum of control and authority that the supervisor exercises over an employee, and not a technicality such as job title that matters in imputing liability to the employer. In *Ellerth*, the Court explored the contours of supervisory power, recognizing that "there are acts of harassment a supervisor might commit which might be the same acts a co-employee would commit, and there may be some circumstances where the supervisor's status makes little difference." *Ellerth*, 524 U.S. at 763. The Court reasoned that the touchstone of corporate liability is

the supervisor's level of control, not his or her title or place in the chain of command. Later, in *White*, the Court expanded on these ideas when discussing an employee's well founded fears of reprisal. The Court recognized that an employee may well choose to ignore very serious harassment rather than risk a suspension, even when that suspension will likely be reversed. "That is to say, an indefinite suspension without pay could well act as a deterrent, even if the suspended employee eventually received backpay." *White*, 548 U.S. at 73.

For the same reasons that the Court in *Faragher* and *Ellerth* believed there needed to be a legal standard preventing retaliation in the harassment context—to ensure that employees would feel comfortable using anti-harassment policies and procedures—the Court in *White* was driven to adopt the "reasonably likely to deter" standard to help prevent retaliation. *Id.* at 66-67. The EEOC Guidance states: "[supervisory] authority must be of a sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment." EEOC Guidance at pt. III.A. The linchpin of the EEOC Guidance is consistent with the "reasonably likely to deter" standard already adopted by the Court in the retaliation context. It is both one that is understood by employers and employees and one that is currently used by the courts.

The EEOC's analysis, similar to what the Court recognized in *White*, "separate[s] significant from trivial harm." *White*, 548 U.S. at 68. The EEOC Guidance imputes liability for the employee's harassment only when the power given assists the

harasser in carrying out the harassment. This approach allows a fact-finder to determine what level of authority to direct is sufficient to hold the employer responsible for the harassing employee's actions.

IV. As The Court Has Recognized In The Area of Sexual Harassment, The EEOC Guidance Should Be Afforded Deference

There is no need for the Court to chart its own course in interpreting section 704(a). Because the EEOC's interpretation is permissible under the language of the statute, is reasonable, and furthers Title VII's purpose of protecting employees against unlawful harassment, the Court should defer to the EEOC's definition.

The Court has long acknowledged that EEOC guidelines are valuable persuasive tools reflecting a longstanding "body of experience and informed judgment to which courts and litigants may properly resort for guidance." *See, e.g.*, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (quoting *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976)); *see also Crawford v. Metro. Gov't of Nashville & Davidson Cnty, Tenn.*, 555 U.S. 271, 276 (2009) (quoting *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998)); *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) (explaining that EEOC compliance manuals "reflect a 'body of experience and informed judgment to which courts and litigants may properly resort for guidance'") (quoting *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998)).

Indeed, the Court has explained that EEOC interpretations are entitled to "great deference" when they are consistent with both the statutory language and purpose. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 433-44 (1971) (finding that because "the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress").

In the harassment context, the Court has often looked to EEOC policies, definitions, and other guidance to inform its jurisprudence. For instance, the Court in *Meritor* referred to the EEOC Guidelines on Discrimination Because of Sex when determining whether Title VII's prohibition of sex-based discrimination encompasses claims for "hostile environment"—that is, claims for sexual harassment not resulting in a tangible economic loss. *Meritor*, 477 U.S. at 65-73 (quoting 29 C.F.R. § 1604.11(a)).

While finding that the EEOC guidelines were "not controlling upon the courts by reason of their authority," the Court in *Meritor* nonetheless afforded great weight to the EEOC's position that Title VII encompasses sex-based harassment having the "purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." *Id.* at 65. In line with this finding and utilizing the EEOC's position, the Court in *Meritor* expressly held that "a claim of 'hostile environment' sex discrimination is actionable under Title VII." *Id.* at 73.

Likewise, in *Suders*, the Court relied in part on the policy contained in an EEOC Compliance

Manual when holding that claims for constructive discharge caused by a sexually hostile work environment are actionable under Title VII. *Suders*, 542 at 142 (2004) (citing 2 EEOC Compliance Manual §612.9(a)) (stating that an employer is responsible for constructive discharge under Title VII). Similarly, in *Crawford,* the Court looked to EEOC guidelines in determining the standard of behavior to satisfy the opposition clause of Title VII in conversations between employees that are "sexually obnoxious." *Crawford v. Metro. Gov't of Nashville & Davidson Cnty, Tenn.*, 129 S.Ct. 846, 851 (2009). The Court again found the EEOC guidelines extremely persuasive. *Id.* at 852. Much like the EEOC guidelines at issue in *Meritor*, *Suders*, and *Crawford*, the EEOC Guidance regarding supervisory status is persuasive and should be afforded deference.

The definition of "supervisor" adopted by the EEOC is not only compelled by *Faragher* and *Ellerth,* but also comports with the common understanding and usage of the word. Most individuals, uneducated in the legal rhetoric of Title VII and the intricacy of corporate hierarchies, understand the term "supervisor" in its plainest and most commonsense meaning: the individual who manages the employee's workload, controls her assignments, and oversees her performance. In other words, a supervisor is the person who directs her work activities on a daily basis. It is unlikely that the typical worker instead understands the term "supervisor" to refer exclusively to the corporate officers who sign paychecks, directly influence

employees' compensation, and hand down final decisions regarding ultimate employment status.

This is consistent with the Oxford English Dictionary's definition of "supervisor": "[a] person who has charge of or responsibility for a business, institution, department, etc.; an overseer; a person who directs or oversees a task or activity." *Oxford English Dictionary Online,* www.oed.com (last visited on 8/30/2012). Because the protections imparted by Title VII should generally comport with common understanding, the Court should adopt a definition of "supervisor" that is familiar to American workers, such as that promulgated by the EEOC.

The EEOC Guidance should also be given deference because of important public policy considerations. If the Court were to restrict the definition of "supervisor" under Title VII to include only those employees with the power to directly affect the terms and conditions of employment, it would invite employers to concentrate all hiring and firing power into as few employees as possible. For example, an employer might require that only human resources, the company president, or the CEO make all personnel decisions. This would restrict those considered "supervisors" under Title VII to only a select few. Simply by limiting the number of corporate employees permitted to make or have a significant influence on ultimate employment decisions, large companies could easily insulate themselves from liability in nearly all hostile environment claims. The only viable cause of action would arise where the alleged harasser is in fact the company president, the head of human resources, or

some similarly high-ranking company officer. If encouraged, such insulation may ultimately render Title VII nearly toothless as a means of protecting employees from hostile or offensive environments.

The EEOC has also consistently advocated for this interpretation, taking this position both in cases it litigates and when participating as *amicus curiae*.[15] The EEOC's definition is a reasonable reading of the statute and reflects the realities of the workplace. It is consistent with both Congress' intent and the Court's view of Title VII's protections, particularly in the harassment area. The Court should defer to the EEOC Guidance.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below, clarify that the EEOC

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[15] *See, e.g.*, Petition of Appellant Equal Employment Opportunity Commission For Rehearing And Suggestion For Rehearing En Banc, *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657 (2012) (Nos. 09–3764, 09–3765, 10–1682) 114 Fair Empl.Prac.Cas. (BNA) 1566; Brief Of The Equal Employment Opportunity Commission As *Amicus Curiae* In Support Of Plaintiff-Appellee For Affirmance, *Weyers v. Lear Operations Corp.*, 359 F.3d 1049, (2004) (No. 02-3732), 2004 WL 3300920; Brief Of The Equal Employment Opportunity Commission As *Amicus Curiae* In Support Of Plaintiff-Appellant, *Dulaney v. Packaging Corp. of America*, 673 F.3d 323 (2012) (No. 10-2316) 114 Fair Empl.Prac.Cas. (BNA) 980; Brief Of The Equal Employment Opportunity Commission As *Amicus Curiae* In Support Of Plaintiff-Appellant, *Whitten v. Fred's Inc.*, 601 F.3d 231 (2010) (No. 09-1265) 108 Fair Empl.Prac.Cas. (BNA) 1510; Brief Of The Equal Employment Opportunity Commission As *Amicus Curiae*, *Mack v. Otis Elevator Co.*, 326 F.3d 116 (2003) (No. 02-7056) 173 L.R.R.M. (BNA).

Guidance is the correct standard for determining vicarious liability of employers in the harassment context, and remand for action consistent with the Court's ruling.

Respectfully submitted on September 5, 2012.

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-556

IN THE
Supreme Court of the United States

MAETTA VANCE
Petitioner,

v.

BALL STATE UNIVERSITY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AS *AMICI CURIAE* OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AND THE RETAIL LITIGATION CENTER IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

In *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), this Court held that under Title VII, an employer is vicariously liable for severe or pervasive workplace harassment by a supervisor of the claimant. If the harasser was the claimant's co-employee, however, the employer is not liable absent proof of negligence. In the decision below, the Seventh Circuit held that actionable harassment by a person whom the employer deemed a "supervisor" and who had the authority to direct and oversee the claimant's daily work could not give rise to vicarious liability because the harasser did not also have the power to take formal employment actions against her. The question presented is:

Whether, as the Second, Fourth, and Ninth Circuits have held, the *Faragher* and *Ellerth* "supervisor" liability rule (i) applies to harassment by those whom the employer vests with authority to direct and oversee their claimant's daily work, or, as the First, Seventh, and Eighth Circuits have held (ii) is limited to those harassers who have the power to "hire, fire, promote, demote, transfer, or discipline" their claimant.

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IN THE

Supreme Court of the United States

No. 11-556

MAETTA VANCE

Petitioner,

v.

BALL STATE UNIVERSITY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AS *AMICI CURIAE* OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AND THE RETAIL LITIGATION CENTER IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICI CURIAE*

Two *amici curiae*, the National Federation of Independent Business Small Business Legal Center and the Retail Litigation Center, submit this brief.[1]

[1] Pursuant to Rule 37.6, *amici* state that this brief was authored in whole by counsel for the National Federation of Independent Business Small Business Legal Center and the Retail Litigation Center. This brief was not authored in any part by counsel for a party to this matter. No person or entity,

The National Federation of Independent Business ("NFIB") is the leading small business association representing small and independent businesses. A non-profit, non-partisan organization founded in 1943, NFIB represents the consensus views of its members in the District of Columbia and all 50 state capitals.

The mission of NFIB is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB also gives its members a power in the marketplace. By pooling the purchasing power of its members, NFIB provides its members timely information designed to help small businesses grow and succeed.

The NFIB Small Business Legal Center is a 501(c)(3) public interest law firm whose goals are to advocate for small business in the courts and to serve as the legal resource for small business owners nationwide.

The issue presented in this case is of critical importance to small business. Small businesses need a clear standard that provides certainty and predictability as to when an employee's actions will be impugned to the employer. A clear standard is important to small businesses as they often lack the ability of larger organizations to parse the language of complicated legal standards before making decisions that could expose them to significant liability.

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other than the *amici curiae*, their members, and their counsel, made a monetary contribution to its preparation and submission. The written consents of the parties to the filing of this brief have been filed with the Clerk.

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and engages in legal proceedings affecting the retail industry. The RLC was formed to provide courts with retail industry perspectives on significant legal issues and to highlight the potential industry-wide consequences of legal principles that may be determined in pending cases. The member entities whose interests RLC represents include diverse retailers operating throughout the nation and providing goods and services to tens of millions of people.

The impact of this decision is also critically important to the retail industry. By their nature, large retail stores have detailed organizational structures that allow for multiple levels of co-worker and manager positions that would benefit from a clear standard for imputed liability. For example, retail store employees work shifts under the supervision of various "managers on duty," but typically only the store manager has the power to hire, fire, promote, demote, transfer, and discipline.

NFIB represents 350,000 businesses nationwide, and the member entities whose interests the RLC represents employ millions of people throughout the United States. Therefore, this brief collectively represents a large segment of working Americans.

The instant case offers an opportunity for the Court to enunciate a judicial standard that provides clear guidance to employees, employers, and courts on the appropriate scope of vicarious employer liability in the Title VII context.

SUMMARY OF ARGUMENT

The Supreme Court decided two watershed employment discrimination cases in 1998: *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). In doing so, the Court set forth clear lines for liability through an affirmative defense that has become a valuable tool for evaluating whether alleged unlawful harassment should be imputed to the employer—the appropriately named *Faragher/Ellerth* defense. The Petitioner and Respondent in this case both refer heavily to *Ellerth* and *Faragher* and thus appear to agree that these decisions reflect good law that should not be upset by the Court in this case.

In interpreting *Faragher* and *Ellerth*, the First, Seventh, and Eighth Circuits have elucidated a supervisor liability standard based on the power to hire, fire, promote, demote, transfer, and discipline. This standard was built on the facts found in those two cases, and courts have appropriately applied it to other real world workplace settings.

Notably, the *Faragher* Court focused on the fact that the supervisors in question "were granted virtually unchecked authority over their subordinates, directly controlling and supervising *all aspects* of Faragher's day-to-day activities." *Faragher*, 524 U.S. at 808 (emphasis added) (internal quotations omitted). That type of complete control—"unchecked" and relating to "all aspects" of work—allowed the Court to impute liability to the employer. Anything less than unchecked authority over all aspects of work defeats the *Faragher/Ellerth* defense.

The Court should adhere to the Seventh Circuit's standard. It properly describes a supervisory relationship because it is the only standard that comports with the principle of agency theory and also provides a bright-line standard. It is a pragmatic standard that offers employers clear directions. *Amici* submit that the Seventh Circuit's standard best reflects the reality of how businesses generally are structured.

If the Court is unable to adopt the Seventh Circuit's standard, then it should adopt a clear standard using the *Faragher/Ellerth* factors, aided by considerations of the extent to which the alleged supervisor exerted control and the availability of other supervisory oversight.

ARGUMENT

At the outset, Petitioner advances a standard for defining a supervisor in a manner that is unrealistic when applied to a large portion of the work world. Petitioner proposes that an individual should be deemed a supervisor merely on the basis of his or her ability to assign tasks to a co-worker. Nevertheless, this concept at best only fits with a classic notion of a large, clearly delineated, and hierarchical organization that may or may not ever appear in the real world.

Small businesses often lack the clearly hierarchical organizational structure that Petitioner contemplates. Retail stores with multiple functional leads and numerous employees, including many hourly employees serving as the "manager of the day" and giving instruction to other employees, frequently have a number of employees per store that would fit Petitioner's overbroad definition of a supervisor. However, these "supervisors" lack the authority to hire, fire, promote, demote, transfer, and discipline.

Any standard the Court adopts should objectively delineate the level of supervisory authority that an employee must demonstrate to create vicarious liability for his or her employer. An employee's allegation that he or she perceived a co-worker to have supervisory authority when in fact that co-worker could merely assign tasks, should not create employer liability *per se* because "[i]n the usual case, supervisory harassment cases involve misuse of actual power, not the false impression of its existence." *Ellerth*, 524 U.S. at 759.

Because "neat examples illustrating the line between the affirmative and merely implicit uses of power are not easy to come by in considering management behavior," *Faragher*, 524 U.S. at 805, the Court must provide unambiguous guidance to employees, employers, and the courts. For a clear delineation, the standard should be objectively apparent, capable of resolution as a matter of law, and rest upon facts that are concrete and immutable between the time of alleged events and the time that a claim is brought.

The Seventh Circuit's standard clearly delineates supervisory power based on the easily recognized power to hire, fire, promote, demote, transfer, and discipline. This standard properly describes supervisor liability in a way that realistically applies to today's businesses. Further, the Seventh Circuit's standard sets out a clear, bright-line test that allows employees and employers to know who qualifies as a supervisor and who does not.

This Court should affirm the Seventh Circuit's clear, bright-line standard. Any modification to the Seventh Circuit's standard should remain a clearly delineated standard that reflects the practical reali-

ties of, and the great variation within, different workplaces.

I. IN ORDER TO THRIVE, SMALL BUSINESSES OFTEN HAVE AMBIGUOUSLY DEFINED SUPERVISORY ROLES OR ONLY ONE PERSON WITH CLEAR SUPERVISORY AUTHORITY, RENDERING PETITIONER'S PROPOSED STANDARD INOPERABLE IN SMALL BUSINESSES

In evaluating the Seventh Circuit's standard, the Court should consider not only how such a standard would be applied at large employers like Ball State University but should also be mindful of the unique challenges that face small businesses. Often, courts and the Equal Employment Opportunity Commission ("EEOC" or "Agency") craft standards of law mainly with large employers in mind. But a one-size-fits-all mentality ignores the crucial differences between small and large employers.

Small businesses often have only one supervisor—the owner. In addition, small businesses often lack the formal organizational hierarchy that the Petitioner contemplates in asserting a broad definition of a supervisor. Instead, and for a number of laudable reasons within its prerogative, a small business may opt for a non-linear or ambiguous organizational structure.

Further, small businesses often allocate the authority to delegate tasks to persons who are in turn subject to the same delegation of authority from others in a bilateral manner. For example, an employee responsible for inventory may direct sales staff to place greater emphasis on sales of particular items; conversely, that same sales staff may direct inventory

personnel to deliver certain items or to purchase others. A small business may determine that a flat, collaborative organizational structure suits its needs better than a hierarchal structure. In such circumstances, Petitioner's proposed standard would render everyone at that organization a "supervisor" merely because they direct the work of others.

In another example, a restaurant may charge both a waitress and a bartender with responsibilities. To fulfill their duties, the waitress and bartender must direct one another on certain tasks. But their duties lead to a collaborative shift. In this example, as in the prior example, *amici* note that each of these collaborative employees must accept assignments from each other but are also in turn responsive to another, higher-level supervisor.

A standard that nominates everyone who has the power to assign tasks as a supervisor would prove inefficacious when applied to small businesses with these characteristics. In such small-business settings, the standard that Petitioner urges would overdiagnose staff as supervisors, when in fact the relationship would clearly be better described as co-workers. The Seventh Circuit's standard eliminates this problem.

According to an NFIB study, 62% of small businesses have employees who have occasional supervisory responsibilities but primarily perform other functions. NFIB National Small Business Poll, *Business Structure*, Vol. 4, Issue 7 (2004). Furthermore, in 65% of small businesses, the organization's owner is the only person whose primary job is to direct, manage, or supervise other employees' work. *Id.* And only 12% of small business employers have at least one employee whose exclusive task is person-

nel or human resources. *Id.* These figures reveal how different small businesses are from the large hierarchical organizations that Petitioner's standard envisions.

This type of problem arose in *Huston v. Proctor & Gamble Paper Prods. Corp.*, 568 F.3d 100 (3rd Cir. 2009). In *Huston*, Ms. Huston argued that although her alleged harassers were co-workers, Proctor & Gamble should have known about the hostile environment because two supervising technicians, Pete Romanchick and Jack Traver, were low-level managers and thus held supervisory positions. *Id.* at 104. Ms. Huston argued that because Messrs. Romanchick and Traver had the authority to report any employee that had violated company policies, they qualified as supervisors. *Id.* at 105.

After analyzing agency theory, the Third Circuit held that "the mere supervisory authority over the performance of work assignments of other co-workers is not, by itself, sufficient to establish an employee's status as a manager." *Id.* at 108. And although the employees oversaw work production, the company did not employ them to discover or act upon harassment. *Id.* at 108-09.

Moreover, in *Faragher*, the Court noted that one of the reasons supervisors should be held to a higher standard is because they have greater power to alter the environment than co-employees. 524 U.S. at 805. For this reason, "supervisor" should be limited to those with such "greater power," the power to hire, fire, promote, demote, transfer, and discipline.

In the examples provided above, where the organizational structure is flat or ambiguously defined or where employers bilaterally allocate the power to

assign tasks, the Petitioner's proposed standard would be overapplied. It would not just be limited to those who have a true ability to alter the working environment of another. Instead, virtually any employee in a small organization could be deemed an alter ego of the employer and impute liability to the employer.

II. PETITIONER'S PROPOSED STANDARD IS UNREALISTIC FOR EMPLOYERS IN RETAIL BUSINESSES BECAUSE MULTIPLE STORE EMPLOYEES MAY ASSIGN TASKS BUT OTHERWISE LACK THE AUTHORITY TO MANAGE THEIR CO-WORKERS, AND THEREFORE ARE NOT THE ALTER EGO OF THE EMPLOYER

Retail organizational structures vary from company to company and from store to store. Nonetheless, because of the large number of people that are needed to serve customers in most large retail stores, and the lengthy store hours involving two or more shifts per day, retailers have complex and layered hierarchies within store settings. Also, at times, a low-level manager, or even a non-manager, will be the highest level employee in the store, serving as the "manager on duty" with authority to assign tasks but without other attributes of a supervisor, such as the authority to hire, fire, promote, demote, transfer, or discipline. These companies would not consider a functional lead or an entry-level department manager, for example, to be the alter ego of the employer for *respondeat superior* purposes.

Courts have consistently distinguished employees who are supervisors "merely as a function of nomenclature from those who are entrusted with actual supervisory powers." *Parkins v. Civil Contrs. of Ill.*,

163 F.3d 1027, 1033 (7th Cir. 1998). In doing so, courts have recognized the impropriety of holding companies liable for the actions of low-level "supervisors" that have no agency power in large companies. *Saxton v. Am. Tel. & Tel. Co.*, 10 F.3d 526, 536 (7th Cir. 1993).

Retail stores often have multiple departments, each of which may have its own organizational structure. For example, a general merchandising store may have a departmental unit for clothing, another unit for kitchen products, a pharmacy unit, and likewise in all of its many departments. That employer may also have additional operational groups, such as cashiers, loaders, shelf stockers, and a customer service team.

In each of these units, a retailer may assign a lead for each shift, such as a lead cashier, who performs the same work as his peers but is additionally tasked with assigning his peers to various stations. Alternatively, or additionally, there may be an entry-level supervisor for these units who performs the same tasks as his peers but receives slightly more compensation than the rest of the employees in the unit and who has minimal, if any, additional training in comparison to the rest of his departmental unit. These leads or entry-level supervisors lack any authority to hire, fire, promote, demote, transfer, discipline, or even schedule shifts for other employees.

For example, some retailers have team leaders, plus at least one additional hourly employee who serves as manager on duty for a shift when the team leaders are not in the store. However, only one manager per store, the Store Team Leader, has the power to hire, fire, promote, demote, transfer, or discipline. Expanding the supervisor definition to cover all

persons with any oversight responsibility would allow the courts to impute liability to the employer through each and every one of these employees, including functional leads and entry-level supervisors.

Further, this overbroad application would offend the agency analysis offered in *Faragher*. In applying agency theory, the Court noted that it was the supervisor's special authority that enhanced the supervisor's ability to harass. *Faragher*, 524 U.S. at 800. But this is not necessarily true for mere leads or entry-level supervisors. One feature that these functional leads or entry-level employees lack is the ability to "implicitly threaten to misuse their supervisory powers to deter any resistance or complaint." *Id.* at 801.

The fact that an employer "authorized one employee to oversee aspects of another employee's job performance" does not by itself establish a Title VII supervisory relationship. *Hall v. Bodine Elec. Co.*, 276 F.3d 345, 355 (7th Cir. 2002). In *Hall*, Louvenia Hall worked in Bodine Electric's gearing/hobbing department. *Id.* at 350. Ms. Hall argued that her harasser, Samuel Lopez, qualified as a Title VII supervisor because he possessed the authority to direct her work operations (i.e., which machines she operated), provided input into her performance evaluations, and trained her and other less experienced employees. *Id.* at 355.

The court held that an employer could only be vicariously liable for the acts of those who can be considered the employer's proxy—an individual holding a sufficiently high position in the management hierarchy of the company. *Id.* The type of marginal discretion Mr. Lopez had over Ms. Hall's work operations was not sufficient to impute Title VII vicarious

liability to Bodine Electric. *Id.* This is a reasonable and appropriate interpretation of how businesses with a hierarchal chain of command might work.

The EEOC Enforcement Guidance also attempts to clarify the supervisor definition. But the EEOC guidelines interpret this Court's views in *Ellerth* and *Faragher;* they do not interpret Title VII. Significantly, the EEOC Guidance concedes that "someone who directs only a limited number of tasks or assignments would not qualify as a 'supervisor.'" U.S. EEOC, Enforcement Guidance: Vicarious Emp'r Liab. for Unlawful Harassment by Supervisors, pt. III.A.2. (1999) (1999 WL 3305874).

Thus, it seems that the Commission would not view the entry-level supervisor or a functional lead as a "supervisor" for purposes of this analysis. The EEOC appears to appreciate that the quality of a functional lead's or an entry-level supervisor's authority is not complete, but rather limited to the power to assign certain tasks within a narrow range. This limited authority should not impute liability to the employer.

III. THE COURT SHOULD INTERPRET "SUPERVISOR LIABILITY" IN A MANNER THAT CREATES A CLEAR STANDARD THAT GIVES FAIR NOTICE TO EMPLOYERS AND EMPLOYEES AND THAT CAN BE OBJECTIVELY APPLIED BY COURTS AS A MATTER OF LAW

This Court held that an employer is subject to vicarious liability for a "hostile environment created by a supervisor with *immediate* (or successively higher) authority over the employee." *Faragher*, 524 U.S. at 807 (emphasis added). While the Petitioner attempts to convince the Court that "immediate"

authority means directing day-to-day activity, she is overlooking a more common interpretation of the word "immediate."

"Immediate" is more properly defined as "acting or being without the intervention of another object, cause, or agency; direct." Merriam-Webster's Collegiate Dictionary (11th ed. 2003). Thus, merely directing day-to-day activities would not rise to the level of "immediate" authority because a higher-level supervisor would have to intervene in more material employment decisions. By definition, however, one with immediate authority could make employment decisions without the intervention of another. This more common and plain reading of "immediate" authority comports with the Seventh Circuit's standard.

This interpretation of "immediate" also corresponds with this Court's own view of an immediate supervisor when, in *Faragher*, the Court found critical that the harasser exercised "unchecked" authority. 524 U.S. at 807. Unchecked authority appears to be synonymous with the common understanding of "immediate" authority. While the Seventh Circuit did not specifically focus on "unchecked authority," it is clear that the court considered the concept and found Ms. Davis wanting precisely in that regard.

By contrast, adopting the Second, Fourth, and Ninth Circuit's view of supervisor liability based on the authority to direct and oversee a claimant's daily work will create a large cohort of employees that would bind the employer to unintended vicarious liability. Employers typically do not hire functional leads and entry-level supervisors with the intent that these persons enforce the employers' anti-harassment policies. Also, employers typically do not confer any

other types of powers to leads or entry-level supervisors that could result in liability of this sort.

The Petitioner's broad definition of "supervisor" involves an examination of subjective and disputable facts for each claim, potentially depriving claimants and courts of more efficient resolution.

A. *Amici* Support the Seventh Circuit's Approach, but in the Event the Court Rejects that Approach, *Amici* Offer an Alternative Standard

The Court held the employer liable for an employee's harassing conduct in *Faragher* based upon specific facts which should guide trial courts when those facts appear in future cases. Specifically, in order to reach its holding, the Court relied upon the facts that the co-workers in question: (1) were granted virtually "unchecked authority" over their subordinates; and (2) were found to directly control and supervise "all aspects" of Faragher's day-to-day activities. *Faragher*, 524 U.S. at 808.

The Court should build on *Faragher's* facts as determinants in resolving future issues of *respondeat superior* in harassment cases. If the Court is unable to adopt the Seventh Circuit's standard, *amici* set forth the following alternative.

NFIB and RLC believe the following features, when taken in totality, rather than applied as a formula, provide employers, employees, and the courts with a better understanding of whether an employee had the capacity to bind an employer. Additionally, all of the determinant features described below have the virtue of being concrete, immutable, and objective. Thus, in the collective, they provide trial courts with a sound test to apply when determining whether

or not an alleged harasser qualifies as a supervisor that imputes liability to a company.

First, courts should consider whether the individual alleged harasser has unchecked authority over the claimant. This quality, that a co-worker's authority is "unchecked" or "immediate" in the sense that he or she does not need to consult with a higher authority before acting, indicates that a co-worker has true supervisory status. If a co-worker's supposed authority must be approved by another, then that co-worker appears more like those he or she oversees than like management.

Second, courts should evaluate whether the alleged harasser's authority is limited or extended to all or almost all of the claimant's activities. A co-worker who has authority, for example, to assign an employee to various stations or to one of a limited selection of tasks known to be within the range of an employee's job description, cannot be said to have authority over all or almost all of that employee's daily activities. The more restricted the list of tasks that lie within an employee's authority to assign, the more limited his or her authority appears, and thus, the co-worker does not exert true supervisory power.

Third, a supervisor should be shown to have constant versus temporary or intermittent authority over the claimant when evaluating whether the supervisor's conduct should be attributed to the employer. An employee who has authority at the beginning of a shift to assign tasks but then does not have further authority appears more like a co-worker than a true supervisor. Likewise, when the job of serving as a team lead is rotated on a periodic basis, the functional lead appears more like his co-workers than like management.

Fourth, a team lead is, by definition, a co-worker that is additionally tasked with administrative responsibilities. A team lead is characterized by the fact that his primary duties are the same as those to whom he assigns tasks, but he additionally has the administrative duty of assigning tasks to others. Thus, a team lead who fits this description should be eliminated from any *respondeat superior* analysis, *per se*.

Fifth, like team leads, entry-level supervisors should, *per se*, be eliminated from this analysis to the extent that the entry-level supervisor and the persons whom he supervises are collectively supervised by another manager. In those cases, the entry-level supervisor's conduct should not be construed as binding an employer.

Sixth, courts should disregard the *Faragher* Court's analysis of physical isolation but should nevertheless consider the reasoning the Court applied in that analysis. Courts should evaluate whether the claimant is hierarchally isolated rather than physically isolated. In *Faragher,* the Court held that the fact that an employee was physically isolated and had little resort to complain of harassing conduct to someone else in the organization was a determinant fact in the Court's holding. 524 U.S. at 808. By the same reasoning, if a claimant is directly supervised by both an entry-level supervisor and another manager who oversees both the claimant and the entry-level supervisor, then a court can fairly conclude that the claimant had direct access to other channels of resolution.

This Court issued its decision in *Faragher* in 1998, visiting upon facts that allegedly occurred between 1985 and 1990. NFIB and RLC note that *Faragher*

was decided before the use of mobile phones and Internet in the workplace. Accordingly, the mere fact of physical isolation ought not to present the same sense of futility to subordinate employees as it did twenty years ago. Thus, while the fact of physical isolation should be discounted as a factor in determining *respondeat superior* liability, the reasoning behind it should be applied to an employee's access to other channels of redress when dealing with functional leads and entry-level supervisors.

In the absence of these six elements, a court should not attribute the harassing conduct to the company. The virtue to this approach is that, like the Seventh Circuit's standard, it encompasses a person with the power to hire, fire, promote, demote, transfer, and discipline and recognizes that some managers may possess enough power to create a hostile environment in which the claimant feels like she cannot control the situation. Unlike the Petitioner's method, however, the alternative approach suggested by *amici* provides employers, employees, and trial courts with defined factors that courts can objectively evaluate and that are likely to remain immutable facts through the parties' discovery efforts. By the term "immutable facts," *amici* are referring to facts that are not easily altered by witnesses' changing testimonies.

B. *Amici* Seek a Standard That Conforms With, Rather Than Expands Upon or Violates, the Principles Set Forth In *Faragher* and *Ellerth*

The Seventh Circuit's standard supported by *amici* can be, and has been, applied by employers, by the Commission, and by courts prior to trial, thereby reducing litigation costs and resources for all

involved, including the courts. In addition, the standard conforms to the principles set forth by this Court in *Ellerth* and *Faragher*. By contrast, Petitioner offers an ambiguous and overbroad standard that contradicts this Court's holdings.

Petitioner justifies her approach by pointing to the rise in harassment claims filed with the EEOC, presumably since the advent of *Ellerth* and *Faragher*. The number of charges has increased; between 2006 and 2011, claims rose from 56,155 to 71,914. U.S. EEOC, *Title VII of the Civil Rights Act of 1964 Charges FY 1997 – FY 2011* (2012). Although claims volume has increased, so have the Agency's findings that there was no reasonable cause to believe that discrimination occurred. *Id.*

In 2005, the Agency found 48.4% of the claims had no reasonable cause; this number steadily increased, and by 2011, the Agency found that 76.9% of the claims had no reasonable cause. *Id.* Further, the EEOC filed less than half as many new lawsuits in Fiscal Year 2012 as the prior year, an indication that the EEOC has focused on pursuing meritorious claims over quantity. Abigail Rubenstein, *EEOC Lawsuit Filings Dip as Agency Focuses on Case Quality*, Law 360, Oct. 5, 2012.

A clear liability standard may not increase the inventory of harassment claims, the majority of which lack reasonable cause according to the EEOC; but a well-articulated standard will help employers' compliance with no-harassment policies, will aid agency investigations, and will assist courts with separating meritorious claims from frivolous claims.

C. The Court Should Affirm Based on the Seventh Circuit's Well-Reasoned Standard; In the Alternative, the Court Should Affirm Based on *Amici's* Alternative Standard

The Court should affirm the instant case on its facts instead of remanding for further fact-finding. If this case cannot be resolved at the summary judgment stage, then almost no case could. Given the costs of litigation, failure to adopt a standard susceptible to resolution at the summary judgment stage will force employers, particularly small businesses, to settle cases regardless of the merits of the claim.

The facts show that Ms. Davis was not Ms. Vance's supervisor. Ball State did not consider Ms. Davis to be a supervisor; the University listed her as a "Catering Specialist" in its Staff List for Dining Personnel. Respondent's Brief in Opposition to Certiorari, at 5a, *Vance v. Ball State Univ.*, No. 11-556 (Jan. 17, 2012). Ms. Vance even conceded that she did not actually know whether Ms. Davis was one of her supervisors. *Vance v. Ball State Univ.*, No. 1:06-cv-1452, 2008 WL 4247836 at *12 (S.D. Ind. Sept. 10, 2008). Ms. Vance acknowledged that "[o]ne day [Ms. Davis is] to tell people what to do, and one day she's not. It's inconsistent." *Id.* However, in a lengthy deposition, Ms. Vance was unable to name one instance where Ms. Davis actually directed her to do any work. *Vance v. Ball State Univ.*, No. 1:06-cv-01452 Docket Docs. 58-2 to 58-7 (S.D. Ind. Nov. 1, 2007). Even under the expansive EEOC Guidelines, in which only the lowest level employees are considered co-workers, Ms. Davis would not qualify as a supervisor.

Even if the Court rejects the Seventh Circuit's standard, the alternative six-factor standard proposed by *amici* eliminates the possibility of imputing supervisor liability to Ball State based on Ms. Davis. Ms. Davis did not have "unchecked authority" over Ms. Vance; Mr. Kimes, all parties agree, served as an authority in most aspects of Petitioner's day. *Vance*, 2008 WL 4247836 at *3. Ms. Davis did not control "all aspects" or even almost all aspects of Ms. Vance's day-to-day activities; she appears to have only told some temporary workers what tasks to perform. *Id.* at *28.

Ms. Davis had, at the most, only intermittent authority. In fact, Ms. Vance contended that Ms. Davis was management merely because she did not clock in. *Id.* at *27. Ms. Davis does not qualify as an entry-level manager and at best could be described as a functional lead whose primary tasks appear similar to Petitioner's. *Id.* Finally, Ms. Davis and Petitioner were both supervised by someone else. *Id.* at *3.

The Court should not leave a case this clear-cut to the lower courts to decipher. The Court should affirm the Seventh Circuit's standard and apply that standard, or the alternative standard proposed herein, to the facts in this case without the need for future review by the trial court.

CONCLUSION

The Court should affirm the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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BRIEF OF NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, ET AL., AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

Amici submit this brief, with the consent of the parties,[1] in support of Petitioner's argument that employers should be subject to vicarious liability when a supervisor engages in workplace harassment and the harassing supervisor has authority to direct and oversee his or her victim's daily tasks. Specifically, the *amici* submit this brief to highlight the realities of the workplace for employees who experience harassment from an immediate supervisor and to highlight social science research about the serious implications of supervisor harassment for workers and their employers.

Because several *amici* have joined this brief, more detailed descriptions of each appear in the Appendix. The *amici* are:

- 9to5, National Association of Working Women
- Asian American Justice Center
- Lawyers' Committee for Civil Rights Under Law
- Leadership Conference on Civil and Human Rights
- Legal Aid Society-Employment Law Center
- Legal Momentum
- National Partnership for Women & Families
- National Women's Law Center
- Service Employees International Union
- Women Employed

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[1] Counsel for *amici* authored this brief in its entirety. No person or entity other than *amici*, their staff, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with Clerk of the Court pursuant to Supreme Court Rule 37.3.

SUMMARY OF ARGUMENT

This case compels the Court to determine how the term "supervisor" should be understood to determine an employer's liability for harassment by a supervisor. When a supervisor engages in unlawful harassment, the employer should be subject to vicarious liability if the harassing supervisor has authority to direct and oversee his or her victim's work. Vicarious liability for supervisory harassment is appropriate because supervisors are aided in such misconduct by the authority that the employer delegates. The vicarious liability standard should apply when the harassing supervisor has authority to undertake or recommend tangible employment decisions or to direct and oversee the employee's work. The Seventh Circuit's overly restrictive standard that vicarious liability can only be imposed when the harassing supervisor has formal authority to hire, fire, promote, demote, or make other such tangible employment decisions fails to comport with the Court's precedent and the realities of the workplace.

Although Title VII has long prohibited discrimination, harassment remains a pervasive problem in the workplace. Over the past decade, the number of charges of harassment filed with federal, state, and local agencies has grown by twenty-five percent. In the face of the prevalent problem of workplace harassment, the Seventh Circuit's standard fails to advance Title VII's primary objectives to prevent and eliminate unlawful discrimination and harassment.

The Seventh Circuit's opinion should be reversed because it fails to comply with Supreme Court precedent, ignores EEOC guidance, and runs contrary to a common sense understanding of the term "supervisor."

Furthermore, by relieving employers of responsibility for the behavior of direct supervisors, the standard adopted by the Seventh Circuit fails to comport with the realities of the workplace because it ignores the crucial role of direct supervisors. Direct supervisors have the greatest practical ability to create a hostile work environment. Their positions of authority within their organizations enable them to set the tone for other employees. While co-worker harassment can create an egregious and unlawful hostile work environment, harassment by a supervisor is generally perceived differently by workers.

The Seventh Circuit's standard diminishes accountability for harassment by direct supervisors and contravenes the purposes of Title VII. The Seventh Circuit's rule also reduces employers' incentives to detect and prevent harassment.

For these reasons, the standard adopted by the Seventh Circuit should be rejected. Employers should be subject to vicarious liability for supervisor harassment if the supervisor has authority to direct and oversee the work of the target of the harassment. The Court need not determine whether the facts of the case prove the existence of a hostile work environment, or whether the plaintiff's

supervisor meets the standard for supervisory liability, but should instead direct the lower courts to resolve this question using the correct legal standard on remand.

ARGUMENT

I. WHILE TITLE VII HAS LONG PROHIBITED DISCRIMINATION, HARASSMENT REMAINS A PERVASIVE PROBLEM IN THE WORKPLACE.

Title VII has long prohibited workplace harassment on the basis of race, color, national origin, religion, or sex. In 1985, after courts began to recognize workplace harassment as a violation of anti-discrimination laws, one researcher predicted that "it is possible by the mid-1990s to eliminate sexual harassment, leaving a more productive and professional workplace for everyone." Barbara A. Gutek, *Sex and the Workplace: The Impact of Sexual Behavior and Harassment on Women, Men, and Organizations* (1985). Nearly thirty years later, this prediction has proven overly optimistic, and unlawful harassment remains prevalent in the workplace.

Thousands of harassment charges are filed with the Equal Employment Opportunity Commission ("EEOC") and state and local agencies each year, and the numbers are on the rise. Over the past decade, the number of charges filed with the EEOC and state and local fair employment practice

agencies alleging harassment has grown by 25%.[2] The number of charges filed with the EEOC each year alleging *racial* harassment is growing at an even faster pace, with an increase of over 31% in the last ten years.[3] Women continue to suffer the brunt of sexual harassment, with women filing 84% of sexual harassment charges filed with the EEOC and state and local agencies.[4]

Indeed, in case after case, workers challenge egregious harassment by supervisors. In *Williams v. New York City Housing Auth.*, a supervisor displayed a noose in his office. 154 F. Supp.2d 820, 821, 824-26 (S.D.N.Y. 2001). In *Curry v. SBC Communications, Inc.*, 669 F. Supp. 2d 805, 814 (E.D. Mich. 2009), a "service leader" hung a noose in the work space and the regional manager saw the noose, left it hanging in place, and joked about it. In *Fuller v. Fiber Glass Sys., LP*, a supervisor made "monkey or gorilla gestures" behind an African American employee. 618 F.3d 858 (8th Cir. 2010). In *Spriggs v. Diamond Auto Glass*, a supervisor repeatedly referred to an African American employee as a "monkey" and "nigger." 242 F. 3d 179 (4th Cir. 2001). In *Hoskins v. Howard University*, a

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[2] Equal Employment Opportunity Commission, Harassment Charges, FY 1997-FY 2011, http://www.eeoc.gov/eeoc/statistics/enforcement/harassment.cfm (last visited Aug. 22, 2012).

[3] Equal Employment Opportunity Commission, Race-Based Harassment Charges, FY 1997-FY 2011, http://www.eeoc.gov/eeoc/statistics/enforcement/race_harassment.cfm (last visited Aug. 22, 2012).

[4] Equal Employment Opportunity Commission, Sexual Harassment Charges http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment.cfm (last visited Aug. 22, 2012).

supervisor told his employee that he had "considered sexually assaulting" her and made "moaning sounds" around her, told her that he was attracted to her, told her that he could not control his feelings around her, and made various sexual remarks to the plaintiff. 839 F. Supp.2d 268 (D.D.C. 2012).

Major cross-organizational studies have shown that large numbers of American women indicate they have been harassed on the job. Paula M. Popovich et al., *Assessing the Incidence and Perceptions of Sexual Harassment Behaviors Among American Undergraduates*, 120 Journal of Psychology 387 (2001). In one survey, a third of women reported that they had experienced sexual harassment in the workplace. Christopher Uggen, Amy Blackstone, *Sexual Harassment as a Gendered Expression of Power*, 69 American Sociological Review 73 (2004).

A cross-generational study of the harassment experiences of physician mothers and their physician daughters revealed that "sexual harassment and gender bias remain stubbornly entrenched in medical training and practice settings." Diane K. Shrier, et al., *Generation to Generation: Discrimination and Harassment Experiences of Physician Mothers and Their Physician Daughters*, 16 Journal of Women's Health 883 (2007). The study found that over a quarter of the female doctors surveyed had experienced harassment by a supervisor. *Id.* at 887.

In traditionally male-dominated fields with few women, sexual harassment occurs at much higher

rates. For example, in a survey of individuals in the armed services, sixty-eight percent of military women responded that they had experienced harassment during their military careers. Juanita M. Firestone, Richard J. Harris, *Perceptions of Effectiveness of Responses to Sexual Harassment in the US Military, 1988 and 1995*, 10 Gender, Work and Organization 51 (2003).

To prevent yet another generation of workers from enduring rampant harassment on the job, the standard of employer liability must advance Title VII's objectives to prevent and eliminate workplace harassment. The opinion below instead undermines Title VII's effectiveness. It should be reversed.

II. THE SEVENTH CIRCUIT'S RULING BELOW IS SQUARELY AT ODDS WITH SUPREME COURT PRECEDENT, THE ORDINARY MEANING OF THE TERM "SUPERVISOR," THE DECISIONS OF LOWER COURTS, AND EEOC GUIDANCE.

a. The Seventh Circuit's opinion misapplies the Court's holding in *Faragher*.

The Seventh Circuit's conclusion that the "authority to direct an employee's daily activities [does not] establish[] supervisory status under Title VII," *Vance v. Ball State University*, 646 F.3d 461, 470 (7th Cir. 2011), fundamentally misapplied the Supreme Court's decision in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Nothing in the facts, holding, or analysis of the *Faragher* decision

supports the restrictive definition of "supervisor," adopted in the Seventh Circuit's prior decisions and applied in this case without further analysis. The decision should be reversed.

Beth Ann Faragher was a 19-year-old college student who worked part time as a lifeguard for the City of Boca Raton. Beth Ann Faragher, *Faragher v. City of Boca Raton: A Personal Account of an Employment Discrimination Plaintiff*, 22 Hofstra Labor & Employment Law Journal 417 (2005). She suffered physical and verbal harassment by two of her supervisors. *Id.* One of the harassers held the title of Chief of the Marine Safety Division and had the authority to hire and discipline lifeguards in addition to supervising their work; the other was a lieutenant who was responsible for directing and overseeing the lifeguards' daily assignments. *Faragher*, 524 U.S. at 781. Both supervisors repeatedly subjected Faragher and other female lifeguards to "uninvited and offensive touching" and lewd and offensive remarks. *Id.* at 781.

The Court ruled that Faragher's employer should be held liable for the hostile work environment created by the supervisors. *Faragher*, 524 U.S. at 810. The Court did not distinguish between the acts of the higher- and lower-ranking harassers, but explicitly held that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with *immediate* (or successively higher) authority over the employee." *Id.* at 807 (emphasis added). Noting that unchecked application of this rule could lead to automatic liability for employers,

the Court further held that when no tangible employment action is taken, the employer may assert an affirmative defense that the employer provided a reasonable system for complaints and the employee unreasonably failed to use it. *Id.*

Nowhere in the *Faragher* decision did the Court evince an intent to exclude harassers with the authority to direct and control their victim's activities from the definition of a "supervisor." To the contrary, in the factual context of the case, the reference to "immediate . . . authority" in the Court's holding could only refer to the supervisor who directed the lifeguards' daily assignments. *Id.* The Court recognized that harassment can be facilitated by the authority delegated by the employer to a supervisor, whether the supervisor has formal authority to make a tangible employment decision or whether the supervisor has the authority to direct and oversee work.

In its discussion of supervisory authority, the Court repeatedly emphasized the importance of supervisors' power to direct and control employees' actions. In analyzing the reasons for holding employers vicariously liable for supervisory misconduct, the Court found persuasive the following rationale:

> [T]he supervisor is clearly charged with maintaining a productive, safe work environment. The supervisor *directs and controls* the conduct of the employees, and the manner of doing so may inure to the employer's benefit or

> detriment, including subjecting the employer to Title VII liability.

Id. at 798 (quoting *Faragher v. City of Boca Raton*, 111 F.3d 1530, 1542 (11th Cir. 1997) (Barkett, J., dissenting in part and concurring in part)) (emphasis added).

In concluding that the City of Boca Raton was liable for the hostile work environment created by Faragher's supervisors, the Court again focused on the supervisors' power over employees' daily activities. The Court noted that "[i]t is undisputed that these supervisors 'were granted virtually unchecked authority' over their subordinates, '*directly controll[ing] and supervis[ing]* all aspects of [Faragher's] day-to-day activities.'" *Id.* at 808 (emphasis added). The Court never discussed the fact that only one of the harassing supervisors had formal authority over Faragher's employment status, and the use of the phrase "these supervisors" leaves no doubt that the Court was referring to both of them.

In the opinion below, the Seventh Circuit mechanically applied its prior precedents that cited the *Faragher* decision but declined to apply its reasoning or holding. The court instead relied on its prior rulings that supervisory authority "primarily consists of the power to hire, fire, demote, promote, transfer or discipline an employee," and the power "to direct an employee's daily activities" is therefore insufficient to confer supervisory status. *Vance*, 646 F.3d at 470 (quoting *Hall v. Bodine Elec. Co.*, 276 F.3d 345, 355 (7th Cir. 2002)); *see id.* (citing *Rhodes*

v. Illinois Dept. of Transp., 359 F. 3d 498, 506 (7th Cir. 2004); *Parkins v. Civil Constructors of Illinois, Inc.*, 163 F. 3d 1027, 1032-34 (7th Cir. 1998)). These authorities are plainly inconsistent with the *Faragher* decision.

Because the court below failed to apply this Court's rule in *Faragher*, the opinion should be reversed.

b. The Seventh Circuit's rule ignores the common sense meaning of "supervisor."

In the opinion below, the Seventh Circuit mechanically applied its prior precedents that not only misread *Faragher*, but also ignored the plain meaning of the word "supervisor." The ordinary meaning of "supervisor" encompasses the power to direct and control employees' daily activities. As used in common parlance, a "supervisor" is "a person who manages or supervises," and the verb "supervise" means "to direct or oversee the performance or operation of" or "to watch over so as to maintain order, etc." Collins Online English Dictionary, 2012, http://www.collinsdictionary.com/dictionary/english/supervisor.

This Court has stressed the importance of a "common sense" approach in applying Title VII's provisions to workplace situations. *See Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 70 (2006); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81-82 (1998). An employee would naturally understand the person who directs her

daily activities to be her "supervisor," and there is no reason to apply a definition in the Title VII context that departs from the common-sense understanding of the word in the workplace environment.

c. The Seventh Circuit decision is at odds with other courts, which have applied a common sense definition of supervisor to determine liability under Title VII.

Both before and after *Faragher*, courts have had little difficulty concluding that an individual with the power to direct and control subordinates' daily activities is a "supervisor" whose actions may render the employer vicariously liable for Title VII purposes. In *Bundy v. Jackson*, 641 F.2d 934, 943 (D.C. Cir. 1981), the court found it was "obvious" that the men who harassed the plaintiff were her supervisors even though only one had control over plaintiff's employment status. In *Johnson v. Booker T. Washington Broadcasting Serv.*, 234 F.3d 501, 511 (11th Cir. 2000), the Eleventh Circuit ruled that a radio program director "clearly" was the plaintiff's supervisor even though he did not have hiring and firing authority. *See also Katz v. Dole*, 709 F.2d 251, 256 n.6 (4th Cir. 1983) ("supervisor" directed day-to-day office management); *Mack v. Otis Elevator Co.*, 326 F.3d 116, 120-21, 125 (2d Cir. 2003) ("mechanic in charge" who oversaw daily assignments was supervisor); *Whitten v. Fred's Inc.*, 601 F.3d 231, 246 (4th Cir. 2010) (store manager who gave plaintiff assignments, set schedule and directed her activities qualified as a supervisor); *Dawson v. Entek Intern.*, 630 F.3d 928, 937 (9th Cir. 2011) ("trainer" who

directed plaintiff's activities on production line was supervisor). The pragmatic approach these courts adopted in determining supervisor status accords with this Court's guidance and the realities of the workplace.[5]

d. EEOC guidance also adopts a common sense understanding to determine liability for harassment by a supervisor.

The EEOC, which investigates tens of thousands of discrimination complaints each year, has also concluded that "supervisory" power extends to the authority to direct and control an employee's daily activities. According to the EEOC guidelines, an individual qualifies as a "supervisor" if "the individual has authority to undertake or recommend tangible employment decisions affecting the employee; *or* the individual has authority to direct the employee's daily work activities." EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, EEOC

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[5] In contrast, courts applying the Seventh Circuit's rule rely on an artificial and limited analysis of formal agency principles that both ignores the Court's analysis of agency principles in *Faragher* and has little to do with workers' understanding or experiences. *See, e.g., Noviello v. City of Boston*, 398 F.3d 76 (1st Cir. 2005); *Joens v. John Morell & Co.*, 354 F.3d 938 (8th Cir. 2004); *Rhodes*, 359 F.3d at 509; *Parkins* 163 F.3d at 1034. While the *Faragher* Court recognized that these common-law principles are "an appropriate starting point" in the vicarious liability analysis, 524 U.S. at 802, it cautioned that they must be adapted to the "practical objectives of Title VII." *Id.* at 803 n.3; *see also Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986).

Notice No. 915.002 (Jun. 18, 1999) (emphasis in original). These guidelines regarding vicarious liability for supervisor harassment apply to harassment based on race, color, sex, religion, national origin, age, or disability. *Id.*

The Court has repeatedly recognized that EEOC interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor*, 477 U.S. at 65; *see also General Electric Co. v. Gilbert*, 429 U.S. 125, 142 (1976). Indeed, the Court has explained that EEOC interpretations are entitled to "great deference" when they are consistent with Title VII's statutory language and purpose. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 433-44 (1971) (because "the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress").

The EEOC's well-reasoned guidance furthers the legislative intent of the statute, comports with a common-sense understanding of the various forms of authority that employers grant to their supervisors, and avoids the arbitrary distinctions between different classes of supervisors created by the Seventh Circuit rule.

III. THE SEVENTH CIRCUIT'S DISTINCTION BETWEEN DIFFERENT CLASSES OF SUPERVISORS IS INCONSISTENT WITH THE REALITIES OF WORKPLACE HARASSMENT.

a. The Seventh Circuit rule excludes those supervisors who have the greatest practical ability to create a hostile work environment.

While high-level supervisors are undoubtedly responsible for maintaining a workplace free from discrimination, it is the supervisors who direct and control workers' daily activities who have the most immediate control over their subordinates' working conditions and the greatest opportunity to inflict harm on employees. Employers should be vicariously liable when a supervisor engages in harassment, regardless of whether the employer has delegated authority in the form of the power to direct and oversee workers or the power to make tangible employment decisions.

A victimized employee need not show economic harm or any tangible employment action such as termination, transfer, or demotion in order to state a hostile work environment claim. *Meritor*, 477 U.S. at 64. Rather, the harm lies in the experience of the work environment itself, as the worker is subjected to harassment so pervasive or severe as to make working conditions demeaning and intolerable. *Id.* at 65-66. *See also Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) ("When the workplace is permeated with discriminatory

intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated.") (citations and internal quotation marks omitted).

For most employees, the direct supervisor who oversees their work is the most significant supervisor in their day-to-day work life, and the supervisor with whom they have the most frequent contact. *See Faragher*, 524 U.S. at 808. Because of this close interaction, the direct supervisor has greater opportunity to engage in "severe or pervasive" harassment than more senior managers who tend to have limited contact with low-level employees.

The abuse of supervisory authority can take many forms, ranging from discriminatory work assignments to physical assault. For example, in *McGinest v. GTE Service Corp.*, 360 F.3d 1103, 1107 (9th Cir. 2004), the plaintiff's direct supervisor assigned him more dangerous duties because of his race. In *Williams v. New York City Housing Auth.*, a white supervisor displayed a noose in his office. 154 F. Supp.2d 820 (S.D.N.Y. 2001). As the court in that case noted, "the effect of such violence on the psyche of African-Americans cannot be exaggerated." *Id.* at 824. In *Dinkins v. Charoen Pokphand USA, Inc.*, 133 F. Supp. 2d 1254, 1258-61 (M.D. Al. 2001), male supervisors at a chicken processing plant subjected female employees to a litany of outrageous conduct, including following female employees into the restroom; touching female employees' buttocks, genitals, and breasts; making constant sexual

comments and gestures; conditioning favorable work assignments on compliance with sexual demands; and victimizing one employee with "a barrage of psychological warfare, stalking and sexual assault." *Id.*

In *Faragher*, the plaintiff suffered egregious harassment by her direct supervisor, who

> [t]ackled Faragher and remarked that but for a physical characteristic he found unattractive, he would readily have had sexual relations with her. Another time he pantomimed an act of oral sex. Within earshot of the female lifeguards, [her direct supervisor] made frequent, vulgar reference to women and sexual matters, commented on the bodies of female lifeguards and beachgoers, and at least twice told female lifeguards that he would like to engage in sex with them.

Faragher, 524 U.S. at 782 (internal citations omitted).

As the *Faragher* Court observed, isolation from more senior supervisors can itself facilitate a hostile work environment, because there may be no immediate check on the direct supervisor's behavior. The harassing supervisors in *Faragher* worked at a remote worksite where Faragher and her colleagues were "completely isolated from the City's higher management." *Id.* at 808-09.

In *Mack v. Otis Elevator*, the "mechanic in charge" at an elevator repair work site sexually harassed and "explicitly questioned [plaintiff's] place in the elevator business as a woman and an African-American." 326 F.3d at 127. In concluding the employer should be vicariously liable for the supervisor's conduct, the Second Circuit reasoned that because the "mechanic in charge" was the most senior employee at the work site, he "possessed a special dominance over other on-site employees . . . arising out of their remoteness from others with authority to exercise power on behalf of [the employer]." *See also Whitten*, 601 F.3d at 245, 247 (store manager who harassed plaintiff was the only supervisor on site).

The supervisors in *Mack*, *McGinest*, *Dinkins* and *Whitten*, as well as one of the supervisors at issue in *Faragher*, would not be considered "supervisors" under the Seventh Circuit rule because none had formal authority over their victims' employment status, even though they used the power and authority delegated by their employers to create hostile work environments. In contrast, many supervisors who fall within the Seventh Circuit rule have little practical ability to create a hostile work environment because of their limited contact with employees. *See, e.g.*, *Dawson*, 630 F.3d at 933 (employee "never . . . dealt with" supervisors other than the immediate supervisors who participated in harassment).

The Seventh Circuit rule is out of step with the reality of today's workplace, in which supervisory relationships are often informal,

reflecting a trend toward a flattening of organizational hierarchies in the modern American workplace. *See* Susan A. Sturm, *Race, Gender & the Law in the Twenty-first Century Workplace: Some Preliminary Observations*, 1:2 U. Pa. Journal of Labor and Employment Law, 639, 659-63 (1998). As a result, "[l]egal analysis that focuses on questions of formal status or position may bear no relation to the actual process of decision making or the capacity or predisposition to abuse power in ways that implicate discrimination." *Id.* at 663.

Although between World War I and 1970 the structure of the American workplace was "largely hierarchical and bureaucratic," changing economic trends have led to a significant reorganization in the workplace since then. Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 Harv. Civ. Rights-Civ. Lib. L. Rev. 91, 99-100 (2003). "As part of the attempt to increase flexibility and institutional receptivity to consumer demand, companies have been flattening hierarchies and pushing management and decisionmaking authority lower. . . . Lower-level employees in these organizations are often given substantial responsibility and decisionmaking authority." *Id.* at 101. These lower-level supervisors frequently direct other employees' day-to-day activities with complete authority.

A consequence of the structure of the modern American workplace is that while many of today's employees have little to no interaction with those supervisors who have the ability to hire, fire,

promote, demote, transfer or discipline them, these same employees interact on a daily basis with lower-level supervisors who direct their work. As this trend toward flattening of organizational hierarchies continues, the Seventh Circuit rule would enable companies to escape liability for the discriminatory acts of lower-level supervisors.

Application of the Seventh Circuit's rule thus leads to the anomalous result of insulating employers from vicarious liability based on the harassing conduct of those very supervisors who are best positioned to "create . . . an actionable hostile work environment," *Faragher*, 524 U.S. at 807.

b. **Harassment by a direct supervisor can have a detrimental effect not only for the target of the harassment, but also for the culture of the workplace and the productivity of the organization more broadly.**

Research into workplace harassment confirms that abusive behavior by supervisors has far-reaching implications for the work environment. As authority figures, supervisors communicate through their words and actions the standards of conduct that are allowed at the workplace. They set the tone for workplace behaviors and their actions can have particularly grave implications for individual employees and for the organization as a whole. And supervisors who direct employees' daily activities and have frequent contact with subordinates are best-positioned to set the code of accepted conduct in

a workplace. Thus, harassment by direct supervisors can set harmful precedents for employees.

i. Because of their positions of authority within their organizations, supervisors set the tone for other employees.

Individuals with a proclivity toward engaging in abusive behaviors are more likely to harass when they see a role model do so. J. Pryor, C. La Vite, and L. Stoller, *A social psychological analysis of sexual harassment: The person/situation interaction*, 42 Journal of Vocational Behavior 68-83 (1993). For better or worse, authority figures often serve as role models; thus, to the extent that supervisors engage in harassing behaviors and reinforce others' tendencies to do the same, the damage is compounded. *Id.* Another study came to the same conclusion, noting that as role models, supervisors should be cognizant of signals they send to subordinates about the permissibility of harassing behavior in the workplace. Rebecca A. Thacker, Stephan F. Gohmann, *Emotional and Psychological Consequences of Sexual Harassment: A Descriptive Study*, 130 Journal of Psychology 442 (1996).

A study of female lawyers in private practice documented this phenomenon. The study concluded that actions by supervisors influenced the behavior of colleagues by implicitly or explicitly permitting other employees to harass workers. David N. Laband, Bernard F. Lentz, *The Effects of Sexual Harassment on Job Satisfaction, Earnings, and*

Turnover among Female Lawyers, 51 Industrial and Labor Relations Review 596 (1998).

Ultimately, when supervisors model and reinforce abusive behavior by employees, a culture is created in which acceptance of harassing behavior is the norm—a paradigmatic example of a hostile work environment. *See* J. Pryor, C. La Vite, and L. Stoller, *A social psychological analysis of sexual harassment: The person/situation interaction*, 42 Journal of Vocational Behavior 68-83 (1993); *Dawson*, 630 F.3d at 933 (after employee complained about taunts and offensive remarks from co-workers, supervisor joined in); *Dinkins*, 133 F. Supp. 2d at 1254 (supervisor told plaintiff daily verbal and physical harassment by co-supervisor was "just playing").

Supervisors who direct employees' daily activities may be the most powerful role models for the organization because of their frequent contact with subordinates. As even the Seventh Circuit has recognized, "Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than [a supervisor's] use of an unambiguously racial epithet such as 'nigger' in the presence of his subordinates." *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993) (citations and internal quotation marks omitted). *See also Swinton v. Potomac Corp.*, 270 F.3d 794, 799-800 (9th Cir. 2001) (plaintiff's immediate supervisor laughed along with racist jokes and never told any employees to stop); *EEOC v. Whirlpool Corp.*, 2009 U.S. Dist. LEXIS 118624, *1-7 (M.D. Tenn. 2009) (rather than

condemning and disciplining workers who racially and sexually harassed a coworker, the supervisor encouraged the harassed African American worker to "give [another worker] what he wants and get it over with").

When direct supervisors harass their subordinates they send powerful messages to both the target of the harassment and other workers about the employer's tolerance for workplace discrimination. Because of their key roles in setting standards in the work environment, their actions should be attributed to their employers.

ii. Harassment from a supervisor often carries different implications than harassment from a co-worker.

Workplace harassment is fundamentally about power,[6] and all supervisors exercise power

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[6] Rebecca A. Thacker, Stephan F. Gohmann, *Emotional and Psychological Consequences of Sexual Harassment: A Descriptive Study*, 130 Journal of Psychology 442 (1996). Accordingly, workers who occupy high-status positions are less likely to be harassed than those in low-status positions, and low-status workers (such as trainees and clerical workers) are more vulnerable than those in professional, managerial, and administrative positions. Robert A. Jackson, Meredith A. Newman, *Sexual Harassment in the Federal Workplace Revisited: Influences on Sexual Harassment by Gender*, 64 Public Administration Review 707 (2004). "Workers who are poorly paid may be easy targets for disrespect and bullying by supervisors--supervisors who are often accorded significant discretion within workplace contexts, and who sometimes activate that discretion in informal and abusive ways." Vincent J. Roscigno, Steven H. Lopez, and Randy Hodson,

over their subordinates in one form or another. For this reason, harassment by supervisors is categorically different than harassment by co-workers.

To be sure, co-worker harassment can lead to employer liability if the employer knew or should have known of the misconduct, unless the employer can show that it took immediate and appropriate corrective action. But because supervisors are aided in such misconduct by the authority that the employers delegate to them, it is appropriate that a different standard of vicarious liability should apply to supervisory harassment.

Regardless of whether the supervisor exercises direct control over employees' tasks or formal control over their work status, abuse of the supervisory position can have devastating consequences for employees and the enterprise itself.

Supervisors are delegated legitimate organizational power over their subordinates, and the structural hierarchy of positions in the organization provides legitimacy—that is, the organization has bestowed legitimacy on the position holder through a managerial, executive, or supervisory title. *See, e.g.*, R. A. Thacker, G. R. Ferris, *Understanding sexual harassment in the workplace: The influence of power and politics within*

Supervisory Bullying, Status Inequalities and Organizational Context, 87 Social Forces 1575, 1564 (2009). Similarly, workers with insecure jobs are common targets for workplace harassment and women in blue-collar jobs are at a unique risk of receiving unwanted sexual attention. *Id.*

the dyadic interaction of harasser and target, 1 Human Resource Management Review 23-37 (1991); M. Weber, *The theory of social and economic organization* (1947).

Due to the "importance of status-based power differentials and organizational context," harassment from a supervisor often carries different implications than harassment from a co-worker. Vincent J. Roscigno, Steven H. Lopez, and Randy Hodson, *Supervisory Bullying, Status Inequalities and Organizational Context*, 87 Social Forces 1561 (2009). *See also* Rebecca A. Thacker, Stephan F. Gohmann, *Emotional and Psychological Consequences of Sexual Harassment: A Descriptive Study*, 130 Journal of Psychology at 439 (1996). Inappropriate behavior by a supervisor is more likely to be perceived as harassment, to be experienced more acutely than it would be if perpetrated by a coworker, and to cause greater psychological trauma and discomfort at work. *Id.*

The very nature of the work relationship between the target and the harasser may determine whether the behavior is perceived as harassment. K. M. York, *Defining sexual harassment in workplaces: A policy-capturing approach*, 32 Academy of Management Journal, 830-50 (1989). In a study of perceptions about harassing behavior on the job, the same behavior was considered by the participants to be more definitely sexual harassment if it was exhibited by a supervisor than by a co-worker. Paula M. Popovich et al., *Assessing the Incidence and Perceptions of Sexual Harassment Behaviors Among American Undergraduates*, 120 Journal of

Psychology 392-93 (2001); *see also* 130 Journal of Psychology at 429-30 (1996) (harassment from a supervisor is more likely to lead to a worsening of the employee's physical and emotional condition, as compared to harassment from a co-worker). *See, e.g.*, *Nichols v. Frank*, 42 F.3d 503, 507, 513 (9th Cir. 1994) (repeated sexual harassment of a postal worker by her immediate supervisor led to suicidal ideations and other severe psychological trauma). "The position of the supervisor or manager has a certain degree of power associated with it that can turn what appears to be an innocuous behavior (e.g., a refusal of a date) into something leading the employee to feel threatened in his or her job." Paula M. Popovich et al., *Assessing the Incidence and Perceptions of Sexual Harassment Behaviors Among American Undergraduates*, 120 Journal of Psychology 395 (2001). As such, employees "may recognize that the power of the supervisor's position makes such behaviors more serious." *Id.*

Harassment from a supervisor or from someone who is higher in the organizational hierarchy is not only more likely to be perceived as harassment, but is likely to cause greater suffering than harassment from a peer or co-worker. *See, e.g.*, E. G. C. Collins, T. B. Blodgett, *Sexual harassment: Some see it. . . Some don't*, Harvard Business Review 77-95 (1981); Kevin Stainback, Thomas N. Ratliff, and Vincent J. Roscigno, *The Context of Workplace Sex Discrimination: Sex Composition, Workplace Culture and Relative Power*, 89 Social Forces 1165 (2011).

Because of the authoritative position of the

supervisor harasser, workers who are targeted for harassment by a supervisor are more likely to suffer psychological trauma because they lack control over their ability to remove the unwelcome harassment. C. Diener, C. Dweck, *An analysis of learned helplessness: II. The processing of success*, 29 Journal of Personality and Social Psychology 940-52 (1980); M. Seligman, *Depression and learned helplessness*. In R. Friedman & M. Katz (Eds.), *The psychology of depression: Contemporary theory and research*, 83-113 (1974).

Harassment from an immediate supervisor as well as other higher level supervisors is also more likely than co-worker harassment to lead to a worsening of an employee's feelings about work. Rebecca A. Thacker, Stephan F. Gohmann, *Emotional and Psychological Consequences of Sexual Harassment: A Descriptive Study*, 130 Journal of Psychology 436 (1996). Because of their positions of authority, there is a greater propensity for supervisor harassers to affect an employee's psychological state in a detrimental way. *Id.* at 439. "Discomfort, anger, guilt, and even fear can affect individuals' emotional/physical condition as well as feelings about their work, and these feelings can, in turn, lead to turnover, absenteeism, and reduced productivity." *Id.* at 430.

This is true whether the supervisor exercises formal control over the employee's employment or direct control over the employee's tasks. In both cases, "[i]t is the authority vested in the supervisor by the employer that enables him to commit the wrong: it is precisely because the supervisor is

understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates." *Meritor*, 477 U.S. at 76-77 (Marshall, J., concurring). *See also Faragher*, 524 U.S. at 803 ("When a person with supervisory authority discriminates in the terms and conditions of subordinates' employment, his actions necessarily draw upon his superior position over the people who report to him.").

iii. Harassment can have detrimental effects not only for the target of the harassment, but on the organization more broadly.

Preventing and rooting out discrimination is critical to both individual workers and organizational productivity. Rebecca A. Thacker, Stephan F. Gohmann, *Emotional and Psychological Consequences of Sexual Harassment: A Descriptive Study*, 130 Journal of Psychology 429-30 (1996). The costs of harassment are estimated to be extremely high, due in part to turnover among those who leave their jobs because of the harassment, payment of leave to those who miss work in an attempt to avoid further harassment, and reduced individual and work-group productivity. Stefan Thau, Rebecca J. Bennett, Marie S. Mitchell, Mary Beth Marrs, *How management style moderates the relationship between abusive supervision and workplace deviance: An uncertainty management theory*, 108 Organizational Behavior and Human Decision Processes 79 (2009).

Women who experience or observe sexual harassment report lower overall job satisfaction and a greater intention to quit their jobs. David N. Laband, Bernard F. Lentz, *The Effects of Sexual Harassment on Job Satisfaction, Earnings, and Turnover among Female Lawyers*, 51 Industrial and Labor Relations Review 596, 594 (1998). In fact, experienced or observed sexual harassment increased the expressed intentions of female lawyers to quit their current workplace within two years by over twenty-five percent. *Id.* at 604. And only sexual harassment *by supervisors* demonstrated a significantly negative impact on the reported job satisfaction. *Id.* at 600.

When employers delegate the authority to direct and oversee subordinates to direct supervisors, those supervisors often have as much, if not greater, capacity to harass subordinates as supervisors with formal control. Because the Seventh Circuit's rule should be rejected because it draws arbitrary distinctions among supervisors that are inconsistent with the realities of workplace harassment.

IV. ADOPTING THE SEVENTH CIRCUIT'S STANDARD AND DIMINISHING ACCOUNTABILITY FOR HARASSMENT BY DIRECT SUPERVISORS WOULD CONTRAVENE THE PURPOSES OF TITLE VII.

Title VII's primary goal is to prevent discrimination in the workplace. "Although Title VII seeks 'to make persons whole for injuries suffered on

account of unlawful employment discrimination, its 'primary objective,' like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm." *Faragher*, 524 U.S. at 807-08 (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975)). The EEOC urges that because "[p]revention is the best tool for the elimination of sexual harassment . . . an employer should take all steps necessary to prevent sexual harassment from occurring." 29 C.F.R. § 1604.11(f) (1996). By diminishing employer accountability for harassment by supervisors, the Seventh Circuit's rule works against these objectives.

Without vicarious liability for harassment by direct supervisors, employers have less incentive to communicate harassment policies, to provide training, and to monitor the actions of all supervisors. Without appropriate training, monitoring, and accountability, supervisors may be more likely to engage in harassment. In *Faragher*, the Court observed that "an employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, train them, and monitor their performance." 524 U.S. at 803. The Court took note in that case that the employer "made no attempt to keep track of the conduct of supervisors," including those who harassed Beth Ann Faragher. *Id.* at 808.

Such preventive measures are essential to combating workplace harassment. Because supervisor harassment derives power from ingrained authority structures in the workplace, "recognition of

the problem must be coupled with a willingness to identify and implement more effective structural changes and to expose and correct discrimination and harassment." Diane K. Shrier, et al., *Generation to Generation: Discrimination and Harassment Experiences of Physician Mothers and Their Physician Daughters*, 16 Journal of Women's Health 894 (2007). Experts recommend training and education for supervisors to increase awareness of the effect of their harassment on their targets and the unique effect of their power positions on the psychological and physical well-being of their subordinates. *See, e.g.*, Rebecca A. Thacker, Stephan F. Gohmann, *Emotional and Psychological Consequences of Sexual Harassment: A Descriptive Study*, 130 Journal of Psychology 442 (1996).

By reducing employers' accountability for the conduct of direct supervisors who are uniquely positioned to create hostile work environments, the Seventh Circuit rule discourages employers from taking these measures. Worse, the Seventh's Circuit's focus on formal, rather than practical, supervisory authority encourages employers to limit formal authority to high-level managers and other supervisors who have minimal contact with employees – thus minimizing exposure to lawsuits while doing nothing to protect employees from unlawful harassment by their immediate supervisors.

CONCLUSION

For the above reasons, the Seventh Circuit's decision should be reversed and remanded.

Respectfully submitted,

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APPENDIX

APPENDIX

Descriptions of the Amici Curiae

The Asian American Justice Center ("AAJC"), a member of the Asian American Center for Advancing Justice, is a national non-profit, non-partisan organization whose mission is to advance the civil and human rights of Asian Americans and build and promote a fair and equitable society for all. Founded in 1991, AAJC advances its mission through litigation, public policy, advocacy, and community education and outreach on a range of issues. AAJC has a long-standing commitment to protecting the rights of Asian American workers by challenging unlawful discrimination and harassment in employment. This interest has resulted in AAJC's participation in a number of amicus briefs before the courts.

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a tax-exempt, nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, law school deans and professors, and many of the nation's leading lawyers. The Lawyers' Committee is dedicated, among other goals, to eradicating all forms of workplace discrimination affecting racial and ethnic minorities, women, individuals with disabilities, and other

disadvantaged populations. The Lawyers' Committee, through its Employment Discrimination Project, has been continually involved in cases before the Court involving the proper construction afforded to federal civil rights laws prohibiting employment discrimination.

The Leadership Conference on Civil and Human Rights is a diverse coalition of more than 200 national organizations charged with promoting and protecting the civil and human rights of all persons in the United States. The Leadership Conference was founded in 1950 by A. Philip Randolph, head of the Brotherhood of Sleeping Car Porters; Roy Wilkins of the NAACP; and Arnold Aronson, a leader of the National Jewish Community Relations Advisory Council. Its member organizations represent people of all races, ethnicities, religions and socio-economic backgrounds. The Leadership Conference works to build an America that's as good as its ideals, and towards this end, works to combat discrimination in all forms, including discrimination in the workplace. The Leadership Conference recognizes that racial and sexual harassment is a persistent problem in the workplace and urges the Court to follow its own precedent, as well as the intent of Title VII, EEOC guidance, and the commonplace understanding of the role of the supervisor, to reverse the narrow standard adopted by the Seventh Circuit.

Legal Aid Society – Employment Law Center (Legal Aid) is a non-profit public interest law firm whose mission is to protect the workplace rights of individuals from traditionally under-represented

communities. Since 1970, Legal Aid has represented clients in cases involving a broad range of employment-related issues, including discrimination and harassment on the basis of race, gender, age, disability, sexual orientation, national origin, and pregnancy. Legal Aid has appeared before this Court on numerous occasions, both as counsel for plaintiffs and in an *amicus curiae* capacity. Legal Aid's interest in preserving the protections afforded employees by this country's antidiscrimination laws is longstanding.

Legal Momentum (formerly the NOW Legal Defense and Education Fund) has worked to advance women's rights for more than forty years. Legal Momentum advocates in the courts, with federal, state, and local policymakers, and with unions and private business to combating gender discrimination and harassment in employment in order to ensure a just society and women's economic security. Legal Momentum has litigated cases to secure full enforcement of laws prohibiting gender discrimination and harassment, including *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and has participated as *amicus curiae* in leading cases in this area. Unfortunately, gender discrimination and harassment in the workplace remain far too pervasive. Therefore, Legal Momentum remains deeply concerned with ensuring that women effectively may use the law to address unlawful employment practices. This case, addressing who is a "supervisor" under Title VII, raises important issues for the effective enforcement of Title VII.

The National Partnership for Women &

Families is a nonprofit, nonpartisan organization that uses public education and advocacy to promote fairness in the workplace, quality health care for all, and policies that help women and men meet the dual demands of work and family. Founded in 1971 as the Women's Legal Defense Fund, the National Partnership has been instrumental in many of the major legal changes that have improved the lives of working women, including advancements in sexual harassment law. The National Partnership has devoted significant resources to combating sex, race, and other forms of invidious workplace discrimination and has filed numerous briefs amicus curiae in the United States Supreme Court and in the federal circuit courts of appeal to protect and the constitutional and legal rights of women and people of color in employment.

The National Women's Law Center (NWLC) is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and opportunities and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity in the workplace. This includes not only the right to a workplace that is free from all forms of discrimination and harassment, but also access to effective means of enforcing that right and remedying such conduct. NWLC has played a leading role in the passage and enforcement of federal civil rights laws, including through class action and pattern or practice litigation and in numerous amicus briefs involving sex and race discrimination in employment before the United States Supreme Court, federal courts of appeals and

state courts. NWLC has prepared or participated in several amicus briefs in Title VII cases, including *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006).

The Service Employees International Union (SEIU) represents 2.1 million women and men working in health care, property services, and public services, including schools and universities. The majority of the workers SEIU represents are women, and many are racial minorities or are foreign-born. SEIU is deeply committed to protecting the rights of all workers to be free from sexual and racial harassment in the workplace. This commitment is reflected in SEIU's Constitution, which affirms that it is an essential part of the union's mission to act as an "advocacy organization for working people" and to oppose "discrimination based on gender, race, ethnicity, religion, age, physical ability, sexual orientation or immigration status."

Women Employed's mission is to improve the economic status of women and remove barriers to economic equity. Women Employed promotes fair employment practices, helps increase access to training and education, and provides women with information and tools to plan their careers. Since 1973, the organization has assisted thousands of working women with problems of discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts. Women Employed strongly

believes that sexual harassment is one of the main barriers to achieving equal opportunity and economic equity for women in the workplace, and when supervisors have the authority to direct and oversee the work of the target of their harassment, vicarious liability should apply.

9to5, National Association of Working Women is a national membership-based organization of women in low-wage jobs working to end discrimination and achieve economic justice. 9to5's members and constituents are directly affected by sex and other forms of workplace discrimination, sexual and other forms of harassment, and retaliation, as well as the difficulties of seeking and achieving redress for all these issues. Our toll-free Job Survival Helpline fields thousands of phone calls annually from women facing these and related problems in the workplace. 9to5 has worked for almost four decades at the federal level and in the states to strengthen protections against workplace discrimination and harassment. The issues of this case are directly related to 9to5's work to protect women's rights in the workplace and end workplace discrimination. The outcome of this case will directly affect our members' and constituents' rights in the workplace and their ability to achieve redress for workplace discrimination, harassment and retaliation.

AMICUS CURIAE BRIEF

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MAETTA VANCE,

Petitioner,

v.

BALL STATE UNIVERSITY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL RETAIL FEDERATION IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The National Retail Federation ("NRF") is the world's largest retail trade association and the voice of retail worldwide. The NRF's membership includes retailers of all sizes, formats and channels of distribution, as well as restaurants and industry partners from the United States and more than 45 countries abroad. In the United States, the NRF represents the breadth and diversity of an industry with more than 25 million employees and generated 2009 sales of $2.3 trillion. As the industry umbrella group, the NRF periodically submits *amicus curiae* briefs in cases raising significant legal issues, including employment law issues, that are important to the retail industry.

In *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), this Court recognized vicarious liability (subject to an affirmative defense) for severe or pervasive workplace harassment committed by a supervisor, while an employer would only be liable for harassment committed by a co-worker if the employer was negligent. The question left unresolved by *Faragher* and *Ellerth* – and the question now being addressed by the Court in this case – is what standard to apply to determine which employees constitute "supervisors" (common law "agents") for Title VII purposes.

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[1] Pursuant to the disclosure requirements of Rule 37.6 of the Supreme Court of the United States, counsel of record for the NRF authored the brief in whole and neither counsel nor a party has made a monetary contribution intended to fund the preparation or submission of this brief. No other person has made a monetary contribution to fund the preparation or submission of this brief.
Pursuant to Rule 37.2, blanket consent has been given.

This question is of vital importance to NRF members. The test established in the Seventh Circuit's opinion in *Parkins v. Civil Constructors of Illinois, Inc.*, 163 F.3d 1027 (7th Cir. 1998), applies vicarious liability to "supervisors" who have the authority to make tangible employment decisions affecting a subordinate's employment. The *Parkins* test is easily applied, definite, and provides employers with the categorical clarity necessary to discern their supervisors from employees. Being able to definitively identify the universe of supervisors allows NRF members to specifically identify and train supervisors on harassment avoidance. This ability was specifically cited by this Court as justification for the imposition of vicarious liability for intentional supervisor harassment and is consistent with the stated purpose of Title VII: deterrence. *Faragher*, 524 U.S. at 805-06; *Ellerth*, 524 U.S. at 764.

The test applied by the Second Circuit in *Mack v. Otis Elevator Co.*, 326 F.3d 116 (2d Cir. 2003), and advocated by the enforcement guidelines of the United States Equal Employment Opportunity Commission, would apply vicarious liability to any employee who has the authority to direct another's daily work activities. The *Mack* test would exponentially expand vicarious liability to categories of employees who would not qualify as agents under traditional common law agency principles for purposes of Title VII. The increased risk of vicarious liability if the *Mack* test were applied across the Country would also have a significant and negative impact on NRF members. The *Mack* standard, with its subjective and results-driven focus on the harassment itself rather than the agency authority

actually invested in the alleged harasser, would significantly impede NRF members in their efforts to identify a greatly expanded universe of "supervisors" and provide harassment avoidance training.

Because this case involves important questions regarding the definition of "supervisor" for purposes of Title VII, it is a matter of vital interest to the NRF and its membership. NRF therefore submits the arguments herein as support for the adoption of the *Parkins* test and in support of Ball State University's opposition to Petitioner's appeal.

The NRF submits this Brief pursuant to Rule 38 of the Rules of the Supreme Court of the United States.

SUMMARY OF THE ARGUMENTS

The *Parkins* test is the appropriate standard for determining supervisor vicarious liability under Title VII. First, the *Parkins* test is the only test consistent with the underlying common law principles recognized in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), *Faragher*, and *Ellerth*, because it focuses on the proper analysis of agency authority applied in each of those cases. The unbridled *Mack* test, on the other hand, *exponentially* broadens the risk of employer vicarious liability beyond anything previously recognized by this Court's precedent. Second, allowing vicarious liability for the unlawful harassment of supervisors who have the authority to take tangible employment actions (while applying a negligence standard for employees who simply manage or oversee work assignments) is consistent with the common law of agency. Finally, the *Parkins* test provides the most

practical standard with the most "categorical clarity" for employers to follow *before* an incident of harassment occurs and is consistent with Title VII's primary deterrence purposes.

ARGUMENT

I. Introduction

Under Title VII, this Court's decisions consistently recognize that only supervisors who are invested with the authority necessary to qualify them as "agents" under the common law of agency will create vicarious liability for employers. *Meritor*, 477 U.S. 57; *Faragher*, 524 U.S. 775; *Ellerth*, 524 U.S. 742. Thus, this Court has consistently refused to apply vicarious liability to the acts of all "supervisors." Underlying this Court's analysis in *Meritor*, *Faragher*, and *Ellerth*, is the necessary goal of recognizing an important line delineating those supervisors with authority to render them common law agents with those employees who lack the requisite agency authority under Title VII.

Petitioner would have this Court ignore *stare decisis* and break with the principles undergirding *Meritor*, *Faragher*, and *Ellerth*, by avoiding any distinction between supervisors who are invested with agency authority and those who are not. Petitioner urges the Court to adopt an almost unbridled rule that goes well outside of this Court's precedent; specifically, Petitioner would have this Court impose vicarious liability on an employer for the acts of any employee who "has the authority to direct an employee's daily work activities." (Petitioner's Brief at 4.) Petitioner's proposed rule

would unquestionably include as "supervisor/agents" many employees who do not have the authority necessary to render them agents, and who thus would not be classified as "supervisors" under *Meritor*, *Faragher*, and *Ellerth*. Petitioner's suggested test would include employees such as lead employees, foremen, senior employees (in seniority-based hierarchies), and even temporary or "fill-in" supervisors.

Adoption of Petitioner's overly broad test would effectively reverse this Court's carefully constructed liability framework grounded in sound agency principles recognized in *Meritor*, *Faragher*, and *Ellerth*. The correct result would be to affirm the *Parkins* test by recognizing vicarious liability only for supervisors who have the "authority to affect the terms and conditions of the victim's employment." 163 F.3d at 1034. The *Parkins* test gives employers and employees the concrete predictability necessary to further Title VII's stated goal of deterring unlawful harassment.

A. This Court Has Chosen Common Law Agency Principles to Guide Employer Liability Under Title VII for the Acts of its Employees

In *Meritor*, this Court defined "employer" to include a common law "agent" of an employer, recognizing that Congress intended "courts to look to agency principles for guidance in this area." 477 U.S. at 72. This definition "surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." *Id.* The Court thus rejected the

argument that "employers are always automatically liable for [] harassment by their supervisors." *Id.* (citing generally Restatement (Second) of Agency §§ 219–237 (1958)).

B. *Faragher* and *Ellerth* Further Relied Upon Common Law Agency Limitations for Limiting Employer Liability

In the companion cases of *Faragher* and *Ellerth*, the Court established a three-prong system of employer liability for workplace harassment. Relevant here, the Court recognized vicarious liability against an employer (subject to an affirmative defense) for workplace harassment committed by an agent-supervisor. *Faragher*, 524 U.S. at 792; *Ellerth*, 524 U.S. at 764-65.

In *Ellerth*, the Court noted the truism that a harassing employee would almost always be aided in his harassment by an agency relationship between the employer and employee. 524 U.S. at 760. Of course, allowing vicarious liability against employers for such a broad "aided in the agency" standard alone would result in vicarious liability for almost *any* act by almost *any* employee. The Court explicitly declined to define employers' vicarious liability so broadly. *Id.* Such a loose standard would also make judicial findings of vicarious liability self-fulfilling: an employee's capability to harass another employee could be used - in a reverse style of logic - to establish that s/he had the necessary agency authority to illegally harass others. To avoid such a result, the Court in *Ellerth* reasoned:

> When a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation.... **The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control.**
>
> . . .
>
> For these reasons [among others], a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer. **Whatever the exact contours of the aided in the agency relation standard, its requirements will always be met when a supervisor takes a tangible employment action against a subordinate.**

Id. at 761–63 (emphasis added). *Ellerth's* "distinct class of agent" logic recognizes that common law

principles narrow the parameters of Title VII "supervisors."

In both *Faragher* and *Ellerth*, the Court stressed the importance of a standard that employers could use in real-world application to further Title VII's purpose of deterring harassment. For example, in applying vicarious liability for acts of agents/supervisors, *Faragher's* majority justified the more stringent vicarious liability standard as reasonable because employers could "guard against [supervisor] misbehavior more easily because their numbers are by definition fewer than the numbers of regular employees." 524 U.S. at 800-01. Similarly, the *Faragher* Court declined to make liability dependent on a distinction between affirmative or implicit uses of power because there was no bright-line rule for determining when an action was affirmative and when it was implicit. *Id.* at 805. The Court cautioned against standards lacking bright-line rules in the context of Title VII because such standards invite "judgment calls," which "would often be close," causing results to "often seem disparate even if not demonstrably contradictory," and making the "temptation to litigate . . . hard to resist." *Id.* In tandem with *Faragher*, the Court in *Ellerth* reaffirmed that Title VII interpretation should be guided by the twin goals of uniformity and predictability. 524 U.S. at 754 (stating the Court's requirement to establish a "uniform and predictable standard" for interpretation of Title VII guided by common law agency principles).

Thus, *Faragher* and *Ellerth* both recognize how vitally important it is for employers to be able to identity with "the virtue of categorical clarity," *Faragher*, 524 U.S. at 801, who is a supervisor/agent

prior to the occurrence of harassment so that the employer can ensure its supervisors are trained in harassment avoidance. *Id.* at 805-06; *Ellerth*, 524 U.S. at 764. This policy consideration was recognized as consistent with Title VII's "'primary objective' . . . to avoid harm." *Faragher*, 524 U.S. at 806 (internal citation omitted). *See also Ellerth*, 524 U.S. at 764 ("Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms," and to "encourage[e] forethought by employers and saving action by objecting employees.").

C. Appeals Courts Define "Supervisor" under Title VII as Those Employees Who Have the Authority to Make Tangible Employment Decisions

Following *Faragher* and *Ellerth*, the Fifth Circuit was the first to address the question of supervisory authority, holding that an employee was the plaintiff's supervisor "because he was authorized to, and did, discharge" the plaintiff. *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 593 (5th Cir. 1998).[2] Similarly, in *Lissau v. Southern*

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[2] Prior to *Faragher* and *Ellerth*, the vast majority of Circuits held that an employer is only vicariously liable for the harassment of employees who had the ability to affect another employee's tangible employment actions. *See, e.g., Volk v. Coler*, 845 F.2d 1422, 1436 (7th Cir. 1988); *Pfau v. Reed*, 125 F.3d 927, 937 (5th Cir. 1997); *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 803 (6th Cir. 1994); *Haynes v. Williams*, 88 F.3d 898, 899 (10th Cir. 1996); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir. 1993); *Swentek v. USAIR, Inc.*, 830

Food Service, Inc., 159 F.3d 177, 179 (4th Cir. 1998), the Fourth Circuit based its determination that an employee was the plaintiff's supervisor under Title VII because the harasser "could hire and fire sales representatives."

Relying on these early cases and *Faragher* and *Ellerth*, the Seventh Circuit, in *Parkins v. Civil Constructors of Illinois, Inc.*, 163 F.3d 1027 (7th Cir. 1998), crafted a standard for determining supervisor status under Title VII that employers could use to identify and train those "few numbers" of employees whose actions could trigger vicarious liability for unlawful harassment. The Seventh Circuit correctly recognized that "because liability is predicated on misuse of supervisory authority, the touchstone for determining supervisory status is the extent of authority possessed by the purported supervisor." *Parkins*, 163 F.3d at 1033 (citing *Wright-Simmons v. City of Oklahoma City*, 155 F.3d 1264, 1271 (10th Cir. 1998)). Avoiding reliance on mere job titles (which could result in a "low-level supervisor" creating liability for an employer even though that supervisor has no more true authority than ordinary co-workers), the court instead held that the key factor to determining supervisor/agent status was the employee's *authority* to affect the terms and conditions of the victim's employment:

> [I]t is manifest that the essence of supervisory status is the authority to affect the terms and conditions of the victim's

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F.2d 552, 558 (4th Cir. 1987); *Yates v. Avco Corporation*, 819 F.2d 630, 636 (6th Cir. 1987).

> employment. This authority primarily consists of the power to hire, fire, demote, promote, transfer or discipline an employee. Absent an entrustment of at least some of this authority, an employee does not qualify as a supervisor for purposes imputing liability to the employer.

Id. at 1034 (emphasis added).

The "*Parkins* test" became the standard for determining a Title VII supervisor.[3] Courts adopting the *Parkins* test generally found the most predictable and practical factor for identifying an employee as a Title VII supervisor was the employee's authority to take tangible employment actions against subordinates.

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[3] *See, e.g., Mikels v. City of Durham*, 183 F.3d 323, 333 (4th Cir. 1999) (recognizing that "[t]he most powerful indicator of [] a threat-induced vulnerability deriving from the supervisor's agency relation lies in his authority . . . to take tangible employment actions against the victim . . . ."); *Noviello v. City of Boston*, 398 F.3d 76 (1st Cir. 2005)(agreeing with *Parkins* rationale); *Joens v. John Morrell & Co.*, 354 F.3d 938, 940 (8th Cir. 2004) ("The majority [of courts of appeals] hold that, to be a supervisor, the alleged harasser must have had the power (not necessarily exercised) to take tangible employment action against the victim, such as the authority to hire, fire, promote or reassign to significantly different duties."); *Phillips v. Taco Bell Corporation*, 156 F.3d 884, 888 (8th Cir.1998) (the store manager was a supervisor for Title VII liability purposes due to the degree of authority he exercised over plaintiff).

D. The Second Circuit Rejects the *Parkins* Test and Expands Title VII Supervisors/Agents to Include Those Employees Who Merely Make or Oversee Daily Work Assignments

No appellate court rejected the *Parkins* test until *Mack v. Otis Elevator Co.*, 326 F.3d 116 (2d Cir. 2003). There, an African-American elevator mechanic's helper brought suit alleging sex and race-based Title VII harassment. 326 F.3d at 120-121. Plaintiff worked as an assistant to six elevator mechanics at a remote location: a client office building. *Id. There was no supervisor who worked at Mack's job site*; rather, mechanic James Connolly – the most senior employee present – was designated mechanic in charge. *Id.* at 120, 125. As such, Mr. Connolly assigned and scheduled work, directed the work force, assured the quality and efficiency of assignments, and enforced safety policies at the separate job site. *Id.* at 120.

Under *Faragher* and *Ellerth*, the Second Circuit was required to determine whether Connolly was a supervisor/agent under Title VII. The *Mack* court began its analysis by rejecting the *Parkins* test. *Id.* at 126. It decided that "*Ellerth* and *Faragher* hold than an employer may be vicariously liable even for the misbehavior of employees who do *not* take tangible employment actions against their subordinate victims." *Id.* (emphasis in original). The court explained:

> The question in such cases is not whether the employer gave the

> employee the authority to make economic decisions concerning his or her subordinates. It is, instead, whether the authority given by the employer to the employee enabled or materially augmented the ability of the latter to create a hostile work environment for his or her subordinates.

Id.

The court thus determined that the proper scope of supervisor authority under Title VII was far broader than allowed for by the *Parkins* test. The court therefore adopted the broadest definition of supervisor from the EEOC enforcement guidelines,[4]

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[4] The EEOC enforcement guidelines stated that an "individual qualifies as an employee's 'supervisor' if: (a) the individual has authority to undertake or recommend tangible employment decisions affecting the employee; *or* (b) [t]he individual has authority to direct the employee's daily work activities." EEOC Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, 8 FEP Manual (BNA) 405:7654 (1999) (emphasis in original). This EEOC guidance is not an agency regulation; thus, no judicial deference is required under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). *See E.E.O.C. v. SunDance Rehabilitation Corporation*, 466 F.3d 490, 500 (6th Cir. 2006) ("As the EEOC acknowledges, its Enforcement Guidance is entitled to respect only to the extent of its persuasive power. The Enforcement Guidance does not receive *Chevron*-type deference . . .") (internal citations omitted). *See also National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101, 110 n.6 (2002) ("[W]e have held that the EEOC's interpretive guidelines do not receive *Chevron*

which included not only supervisors who have the authority to make tangible employment actions (the *Parkins* test), but also those employees who merely have the "authority to direct the employee's daily work activities." *Id.* at 127.

Under that expansive test, the appeals court determined that Connolly was a supervisor because his "authority over Mack . . . enabled him, or materially augmented his ability, to impose a hostile work environment on her." *Id.* at 125. The court further emphasized that Connolly's authority was primarily due to the remoteness of the job site and the significant fact that there were no supervisors at the job site who could have "checked" Connolly's behavior:

> [Connolly] possessed a *special dominance* over other on-site employees . . . arising out of their remoteness from others with authority to exercise power on behalf of Otis. There was no one superior to Connolly at [the work site] whose continuing presence might have acted as a check on Connolly's coercive misbehavior

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deference.") (citations omitted); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (stating that interpretations contained in enforcement guidances lack the force of law and do not warrant *Chevron*-style deference; they "are 'entitled to respect' under our decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), but only to the extent that those interpretations have the 'power to persuade,' *ibid.*").

> toward other Otis employees there.

Id. (emphasis added). These "twin factors" were essential for the court's decision, but appear nowhere in the Petitioner's proposed rule here.

Following *Mack*, a minority of other Circuits held that supervisors include those who direct work assignments. *Whitten v. Fred's, Incorporated*, 601 F.3d 231 (4th Cir. 2010); *McGinest v. GTE Service Corp.*, 360 F.3d 1103 (9th Cir. 2004).

II. This Court Should Adopt the *Parkins* Test as the Appropriate Standard Under *Faragher/Ellerth* for Defining a Supervisor/Agent under Title VII

The *Parkins* test is the only test consistent with *Meritor*, *Faragher*, *Ellerth*; the *Mack* test *exponentially* broadens the risk of employer vicarious liability beyond anything previously recognized by this Court's precedent. Limiting vicarious liability for supervisor harassment to those who have the authority to affect another employee's economic work conditions (while applying a negligence standard for employees who simply manage or oversee work assignments) is consistent with the recognized principles of the agency law. Also, the *Parkins* test provides the most practical standard with the most "categorical clarity" for employers to further Title VII's deterrence goals.

A. The *Parkins* Test, and Not the *Mack* Test, is Consistent with Common Law Agency Principles

In addition to the "aided in the agency" analysis of *Ellerth* discussed above, this Court has long recognized the "fellow servant" rule from the common law of agency. Traditionally, "one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow servants in the course of the employment." *New England Railroad Company v. Conroy*, 175 U.S. 323, 327 (1899). Thus, a bedrock principle of this Court's agency law is that employers are not liable to co-workers who are injured by the negligence of fellow co-workers. *See Jansen v. Packaging Corporation of America*, 123 F.3d 490, 508-09 (7th Cir. 1997) (Posner, J., concurring and dissenting).[5]

However, there was a recognized exception to the fellow servant rule. If the negligent employee was a "vice-principal," meaning an employee who has been invested with inherent, non-delegable duties by the employer, then his actions triggered strict liability. *See, e.g., Baltimore & O.R. Co. v.*

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[5] *See also Northern Pacific Railroad Company v. Peterson*, 162 U.S. 346, 353 (1896) ("The general rule is that those entering into the service of a common master become thereby engaged in a common service, and are fellow servants; and, prima facie, the common master is not liable for the negligence of one of his servants which has resulted in an injury to a fellow servant."); *Conroy*, 175 U.S. at 327 ("There is a general rule of law, established by a great preponderance of judicial authority in the English and in the state and Federal courts, that one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow servants in the course of the employment.").

Baugh, 149 U.S. 368, 383 (1893); *Peterson*, 162 U.S. at 354. Under common law agency principles, vice-principals were: (1) employees who managed a department or division, *Baugh*, 149 U.S. at 383 ("[I]f the business of the master and employer becomes so vast and diversified that it naturally separates itself into departments of service, the individuals placed by him in charge of those separate branches and departments of service, and given entire and absolute control therein, are properly to be considered, with respect to employe[e]s under them, vice principals . . . "), or (2) employees in whom the master delegated responsibility for "a reasonably safe place at which to work, with reasonably safe machinery, tools, and implements to work with, with reasonably safe materials to work upon, and with suitable and competent fellow servants to work with him. . ." *Id.* at 387 (internal quotation and citation omitted).

Over time, plaintiffs attempted to expand the vice-principal exception to the fellow-servant doctrine by arguing that strict liability applied to the negligence of employees who control and direct another's work activities. *See, e.g., Chicago, M. & St. P. Ry. Co. v. Ross*, 112 U.S. 377, 390 (1884), *rev'd Conroy*, 175 U.S. at 341. This Court rejected such expansion, however.[6] The Court in *Peterson*, summarizing relevant precedent, held as follows:

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[6] This rejection is best demonstrated in the *Case of Ross*. There, a locomotive engineer alleged injury when a train conductor's negligence caused an accident. 112 U.S. at 381-82. Plaintiff argued that because the conductor had the right to "command the movements of a train and control the persons employed upon it," represented "the company while performing those duties," and did not "bear the relation of fellow servant to the engineer and other employe[e]s on the train," he was a vice-

> [T]he master's responsibility for the negligence of a servant is not founded upon the fact that the servant guilty of the neglect had control over, and a superior position to that occupied by, the servant who was injured by his negligence. The rule is that, in order to form an exception to the general law of nonliability, the person whose neglect

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principal warranting strict liability for his negligence. *Baugh*, 149 U.S. at 379 (summarizing *Case of Ross*). This Court agreed, holding "that the conductor of a railway train, who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it, and control over the persons employed upon it, represents the company, and, therefore, that, for injuries resulting from his negligent acts, the company is responsible." *Case of Ross*, 112 U.S. at 394.

However, the *Case of Ross* was almost immediately overruled by *Baugh*, wherein this Court refused to apply strict liability to the negligence of an engineer who had control and gave orders to an engineer who was injured. *Baugh*, 149 U.S. at 387; *see also Conroy*, 175 U.S. at 346 (recognizing *Baugh*'s implicit overruling of *Case of Ross*). The *Case of Ross* was then *explicitly* overruled in *Conroy*, in which this Court surveyed the common law and recognized that general principles of agency will *not* impose strict liability on the negligence of employees who simply manage or control other employees. 175 U.S. at 336 ("It may safely be said that this court has never recognized the proposition that the mere control of one servant over another in doing a particular piece of work destroys the relation of fellow servants, and puts an end to the master's liability.") (citing *Baugh*).

> caused the injury must be 'one who was clothed with the control and management of a distinct department, and not a mere separate piece of work in one of the branches of service in a department.' This distinction is a plain one, and not subject to any great embarrassment in determining the fact in any particular case.

162 U.S. at 355. *See also Jansen*, 123 F.3d at 508-09.[7]

Under *Meritor*, *Faragher* and *Ellerth*, this Court has established that Title VII should be guided by the common law of agency. The *Parkins* test is consistent with the long-recognized common law fellow servant rule and its vice-principal exception. The Second Circuit's *Mack* analysis is not compatible with common law principles, as best

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[7] *See also Cooper v. Penn Bridge Co.*, 47 App. D.C. 467, 472 (D.C. Ct. 1918) (holding a superintendent a vice-principal because he had "complete charge of the men," including the ability to hire, pay and discharge them.). Texas continues to recognize the vice-principal exception to the fellow servant rule in workplace torts and continues to adhere to the rule that a vice-principal must have the ability to affect tangible employment decisions such as hiring and firing. *See Garrett v. Great Western Distributing Company of Amarrillo*, 129 S.W.3d 797, 802 ("Having some supervisory authority over others without the ability to hire and fire is not enough" to constitute a vice principal.).

evidenced by this Court's decision in *Peterson*. For this reason alone, this Court should reject Petitioner's proposal to expand vicarious liability to classes of employees who would never have been found to warrant such liability under common law principles.

B. The Second Circuit's *Mack* Test is Impractical, Unpredictable, and Unworkable

The Seventh Circuit's *Parkins* standard is not only consistent with this Court's agency principles, it is also the only practical approach for employers and lower courts. The Seventh Circuit's approach allows employers and courts to determine – without question or ambiguity – which employees can trigger strict liability. *See, e.g., Browne v. Signal Mountain Nursery, L.P.*, 286 F. Supp. 2d 904, 914 (E.D. Tenn. 2003).[8] Under this Court's recognized purpose of Title VII, the ability to definitively identify supervisory employees allows employers to target those supervisors with appropriate harassment training to deter future Title VII violations.

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[8] To demonstrate the amorphous and overly broad nature of the *Mack* test, the court in *Browne* pointed to a prior district court that struggled to apply the *Mack* test. 286 F. Supp. 2d at 914 (citing *Dinkins v. Charoen Pokphand USA, Inc.*, 133 F. Supp. 2d 1254 (M.D. Ala. 2001)). As the *Browne* court noted, the court in *Dinkins* engaged in "hair-splitting" when it was forced to narrow the *Mack* test so that it could be applied to the facts. 286 F. Supp. 2d at 914 (citing *Dinkins*, 133 F. Supp. 2d at 1266). Even using a narrowed *Mack* test, however, "[t]he more nebulous the standard for determining which employees are supervisors" led "the court in *Dinkins* [to] identif[y] eleven individuals who were potentially supervisors." *Id.* (citing *Dinkins*, 133 F. Supp. 2d at 1267, n.17).

Application of the *Mack* test, on the other hand, would too often rely upon subjective judgments. This reliance invites circular or results-driven reasoning, and would produce unpredictable, and even contradictory results. *See Browne*, 286 F. Supp. 2d at 914; *Dinkins*, 133 F. Supp. 2d at 1267. For example, under the *Mack* test, courts would need to examine how each separate employee's authority was communicated, the victim's understanding of such authority, and any other factors which prevent the victim from resisting or stopping the harassing employee. *See, e.g., Mikels*, 183 F.3d at 333–34 (assuming, without deciding, employers could be held vicariously liable for actions of employees with lesser forms of supervisory authority, "the victim's response in context may be highly probative on the issue"). Courts would also be forced into circular, results-driven analysis by focusing first on the circumstances surrounding the harassment and the victim's response before even determining whether the harasser had the *authority* to qualify as a supervisor. *See Mack*, 326 F.3d at 126 (the proper focus is "whether the authority given by the employer to the employee enabled or materially augmented the ability of the latter to create a hostile work environment for his or her subordinates.").

With the exaggerated, unpredictable *Mack* standard, many more employees will fall into the category of Title VII supervisor[9]; a result which would be incompatible with this Court's principles in its Title VII precedent. In fact, the logic of the *Mack* approach would result in a dramatic increase of vicarious liability to cover any employee with even a modicum of superiority over another employee.

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[9] *See, e.g., Dinkins*, 133 F. Supp. 2d at 1267 n.17.

Factors that could trigger supervisory status under the elastic *Mack* approach include such everyday workplace factors as seniority, performance history, perceived management favor, temporary direction of work, and personal relationships with superiors. *Browne*, 286 F. Supp. 2d at 914. Many non-supervisory positions would be held "supervisors" under the *Mack* test, including forepersons, temporary "fill-in" supervisors, lead employees, and senior employees in hierarchical organizations. Allowing vicarious liability for the actions of these lower-level employees is contrary to this Court's already recognized application of common law agency principles under Title VII, *Meritor*, *Faragher* and *Ellerth*. The *Mack* test, if applied across the country, will have a devastating impact on employers' ability to predict, train, and control supervisors in the workplace.

C. The *Parkins* Test is Consistent with Supreme Court Precedent Interpreting Title VII

Petitioner erroneously argues that the *Parkins* test is wrong because it is inconsistent with an isolated factual statement in *Faragher*. Petitioner reads *Faragher* as applying vicarious liability to the conduct of any employee "with power to 'control[] and supervis[e] all aspects of [their target's] day-to-day activities.'" (Petitioner's Brief at 19) (quoting *Faragher*, 524 U.S. at 808.) Petitioner's argument oversimplifies *Faragher* and selectively identifies findings of fact that were not reviewed by the Supreme Court.

1. Lower Courts' Findings in *Faragher* Demonstrate the Supreme Court Did Not View Employee Silverman in Isolation

The unique factual circumstances in *Faragher* do not require the rejection of the *Parkins* test. Instead, when viewed in the totality of circumstances of *Faragher* and the Court's rationale in *Ellerth*, it is clear that the *Parkins* test - not the *Mack* test - is the most consistent with the rationale of both cases, and thus *stare decisis* supports this Court's adoption of the *Parkins* test.[10]

An objective review of the factual and procedural review of the record in *Faragher* demonstrates Petitioner's erroneous analysis. After a bench trial on Faragher's Title VII sex harassment claim, the district court made certain findings of fact. *Faragher*, 864 F. Supp. 1552 (S.D. Fla. 1994); *Faragher v. City of Boca Raton*, 111 F.3d 1530, 1534 (11th Cir. 1997) *rev'd*, 524 U.S. 775 (1998). Relevant here, the district court found that Faragher was a

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[10] The doctrine of *stare decisis* is "the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion," and permitting "society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986). "While *stare decisis* is not an inexorable command," this Court has repeatedly stated that it will diverge from "the straight path of *stare decisis*" only "when the Court [feels] obliged 'to bring its opinions into agreement with experience and with facts newly ascertained.'" *Id.* (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)).

lifeguard working in the Marine Safety Section of the City's Parks and Recreation Department, *Faragher*, 864 F. Supp. at 1555, and that the Marine Safety Section was organized in a "paramilitary configuration," with a "clear chain of command," wherein lifeguards reported *directly* to lieutenants and captains who in turn reported to Chief Bill Terry, the head of the Section. *Faragher*, 864 F. Supp. at 1564.

Because of the paramilitary structure of the Section, the district court further decided that Chief Terry had significant formal authority over Section employees; namely, the authority to "hire new lifeguards (subject to the approval of higher management), to supervise all aspects of the lifeguards' work assignments, to engage in counseling, to deliver oral reprimands, and to make a record of any such discipline." *Id.* at 1563-64. Further, Lieutenant (and later Captain) Silverman was "responsible for making the lifeguards' daily assignments, and supervising their work and fitness training." *Id.* at 1555. Faragher reported directly to Silverman, and in turn to Terry. *Id.*

Contrary to Petitioner's argument, the district court decided that Terry and Silverman's combined authority over City lifeguards did not end with their formal responsibilities. Instead, because of the unique circumstances of the Marine Safety Section's paramilitary structure and the City's abdication of responsibility over it, the trial court concluded that the City had effectively given Terry and Silverman special and near-absolute authority over Section employees. For example, the trial court decided that lifeguards and supervisors were stationed at the city beach and worked out of the Marine Safety

Headquarters, *Id.* at 1555-56, which "was thus physically remote from City Hall." *Faragher*, 111 F.3d at 1544 (emphasis added). Due to this remoteness, "the lifeguards' contacts with higher city officials ... were almost non-existent." *Id.* Like all lifeguards at the Marine Safety Headquarters, Faragher was "completely isolated from the City's higher management, and Terry and Silverman directly controlled and supervised *all* aspects of her day-to-day activities." *Id.* (emphasis added). The combined authority invested in Terry and Silverman was "virtually unchecked," *Faragher*, 524 U.S. at 808, because the City "divested itself of all responsibility for the social climate of the lifeguards' work environment." *Faragher*, 111 F.3d at 1544. As a result, the appeals court had also concluded that "Terry and Silverman essentially were given unfettered responsibility for and control over that environment, and that the lifeguards had no effective avenue of redress with the City." *Id.* (emphasis added).

Based on the district court's findings, among other things, the appeals court decided that this near-absolute authority over Faragher's employment collectively rendered Terry and Silverman agents of the City; thus, the City was "directly liable for Terry's and Silverman's conduct under agency principles based on Terry's and Silverman's supervisory authority and the overall workplace structure," and ". . . because the conduct was severe and pervasive and supported 'an inference of knowledge, or constructive knowledge, on the part of

the City regarding Terry's and Silverman's sexual harassment.'" *Faragher*, 111 F.3d at 1534.[11]

2. The Supreme Court Did Not Review Lower Courts' Facts Regarding Superiors' Authority

This Court granted certiorari review of the *en banc* Eleventh Circuit's decision in *Faragher* to address one issue: the "identification of the circumstances under which an employer may be held liable under Title VII . . . for the acts of a supervisory employee whose sexual harassment of subordinates has created a hostile work environment amounting to employment discrimination." *Faragher*, 524 U.S. at 780. This Court held that "an employer is vicariously liable for actionable discrimination caused by a supervisor, but subject to an affirmative

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[11] After judgment was entered for Faragher on her Title VII claim in the amount of $1 in nominal damages, both Faragher and the City cross-appealed, presenting six narrow issues for review. *See Faragher*, 76 F.3d 1155, 1159-60 (11th Cir. 1996). Significant to this Court's later analysis, the City did not appeal the trial court's findings (1) that Terry and Silverman had been "granted virtually unchecked authority" over lifeguards, including the authority described above; or (2) the fact that Faragher and the other lifeguards were "completely isolated from the City's higher management." *Faragher*, 524 U.S. at 808 (noting that these facts were "undisputed" because "[t]he City did not seek review of these findings."). On appeal, a panel of the Eleventh Circuit reversed the district court's judgment for Faragher on her Title VII sexual harassment claim against the City, but affirmed the district court's judgment in all other respects. *Faragher*, 76 F.3d 1155. After vacating the panel opinion, the Eleventh Circuit reheard the appeal *en banc*, and reversed the district court's judgment as to Faragher's Title VII claim.

defense looking to the reasonableness of the employer's conduct as well as that of a plaintiff victim." *Id.*

The Court accepted the district court's factual findings concerning the unique paramilitary structure of the Marine Safety Section *and* Terry *and* Silverman's near-total authority over lifeguards because "[t]he City did not seek review of these findings." *Id.* at 808. Because of the lower court's findings regarding the unique paramilitary structure of the Marine Safety Section, the remoteness of the lifeguard's workplace, and the "virtually unchecked" authority Terry and Silverman together had over Faragher, this Court concluded that Terry and Silverman together had sufficient authority over the lifeguards to qualify as common law agents, thus warranting the imposition of vicarious liability on the City for their misconduct. *Id.*

3. A Complete Review of the Unique Facts in Faragher Refutes Petitioner's Claim that Faragher Requires Application of the Mack Test

An objective review of the *Faragher* record exposes several false bases in Petitioner's argument for adopting the *Mack* test. First, *Faragher* did not resolve the proper standard for determining whether an employee is vested with the necessary authority to warrant the application of vicarious liability for his actions. Petitioner, thus, incorrectly asserts that *Faragher held* that vicarious liability will *always* be applied to any employee who assigns or oversees another employee's daily work. The Court simply

did not define the parameters of the authority that must be invested in an employee before vicarious liability will be applied.

Second, Petitioner's out-of-context focus on an isolated statement in *Faragher* concerning only Silverman's formal authority to "control[] and supervis[e] all aspects of [Faragher's] day-to-day activities" ignores the other unique and important facts that together were relied upon for the Court's analysis: namely, that Silverman and Terry, *together*, had "virtually unchecked authority," *Faragher*, 524 U.S. at 808, and "unfettered responsibility for and control over [the employees'] environment." *Faragher*, 111 F.3d at 1544.[12] Most importantly, the "virtually unchecked authority" the City afforded to the two supervisors in a paramilitary organization in *Faragher* is

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[12] The *Faragher* decision is silent as to whether Silverman would have been considered a supervisor for purposes of Title VII in the absence of Terry, if he was employed in a non-paramilitary employment structure, or if Silverman had been working in a facility with higher management present to check his "unfettered" and "virtually unchecked" authority. Because of this silence, and because it was not the issue to be decided in *Faragher*, the sentence primarily relied on by Petitioner is, at best, dicta and not controlling on this Court's review of the specific standard for determining who is a supervisor/agent for purposes of Title VII. *See Central Virginia Community College v. Katz*, 546 U.S. 356, 363 (2006) ("[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.") (citing *Cohens v. State of Virginia*, 19 U.S. 264, 6 Wheat. 264, 399-400, 5 L. Ed. 257 (1821) ("It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.").

significantly greater than the *Mack* test advocated by Petitioner here: the mere ability to "direct daily work activities." One common hypothetical clearly demonstrates why the *Mack* standard is contrary to this Court's *Faragher* analysis: under the *Mack* test, a lead employee in a manufacturing facility (where higher managers also work) who has only the authority to tell other employees which machines to operate during a shift would qualify as a "supervisor" for purposes of Title VII. To argue that such a result is *required* by *Faragher* is absurd: one simply cannot equate this hypothetical lead employee's meager duty with the "virtually unchecked authority" of the two supervisors in *Faragher*.

4. Petitioner's Argument Conspicuously Ignores *Ellerth's* Significant Holding That Undermines Petitioner's Argument

Petitioner's constricted focus on out-of-context statements in *Faragher* while ignoring contrary language in *Ellerth* further undermines her argument. The *Ellerth* Court noted that a supervisor is someone who "has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control." 524 U.S. at 761 (emphasis added). The *Ellerth* Court's analysis demonstrates why this Court has highlighted the difference between a supervisor and a co-employee - a distinction Petitioner asks this Court to reject:

> As a general proposition, only a supervisor, or other person acting with the authority of the company, can cause this sort of injury [i.e., a tangible employment action]. A co-worker can break a co-worker's arm as easily as a supervisor, and anyone who has regular contact with an employee can inflict psychological injuries by his or her offensive conduct. . . . But one co-worker (absent some elaborate scheme) cannot dock another's pay, nor can one co-worker demote another. **Tangible employment actions fall within the special province of the supervisor. The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control.**

Id. at 762 (emphasis added) (internal citations omitted).[13] *Ellerth* is thus squarely at odds with the *Mack* standard advocated by Petitioner.

While Petitioner ignores the above-quoted language of *Ellerth*, she does argue that *Ellerth*'s reference to "'an actionable hostile environment created by a supervisor with *immediate* (or successively higher) authority over the [victim]'" .... "refutes the Seventh Circuit's premise that harassment by highlevel (sic) management is the rule's primary or sole concern." (Petitioner's Brief at 21) (quoting *Ellerth*, 524 U.S. at 765 (emphasis in original)). However, Petitioner's argument is inapposite.[14] First, the quoted language is dicta, as the Court in *Ellerth* did not decide the minimum authority necessary for a supervisor to be considered an agent for Title VII purposes.[15] Second, Petitioner misstates the Seventh Circuit's premise in *Parkins*. Nowhere in *Parkins* did the Seventh Circuit hold

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[13] When *Faragher* is read in context with *Ellerth*, it becomes clear that the combined supervisory authority of Terry and Silverman – "unfettered" and "virtually unchecked authority" – is actually a *higher* standard than the description of "supervisor" in *Ellerth* or the *Parkins* test. Even a supervisor who has the ability to make tangible employment decisions will rarely have "virtually unchecked authority," *Faragher*, 524 U.S. at 808, and "unfettered responsibility for and control over [a work] environment." *Faragher*, 111 F.3d at 1544.

[14] Significantly, not even the Second Circuit, when deciding *Mack*, relied on the language from *Ellerth* quoted by Petitioner to justify its reasoning or holding.

[15] Petitioner admits as much in her Petition for a Writ of Certiorari. (Petition for Writ at 3-4.) Moreover, this Court would likely not have accepted review of the question had it been already decided in *Ellerth*.

that *only* high-level supervisors, and not direct supervisors, are agents warranting vicarious liability. To the contrary, the *Parkins* test is as applicable to direct supervisors as it is to higher-level management. Third, in actuality, *Ellerth*'s reference to "direct (or successively higher) authority" undercuts Petitioner's argument. The *Mack* test applies "supervisor" status to any employee who oversees another's daily activities, irrespective of whether the subordinate employee "immediately reports" to the assigning employee. As a result, there is no question that the *Mack* test *exponentially* broadens the definition of supervisor beyond even the language from *Ellerth* relied upon by Petitioner.

Thus, when *Faragher* is read in conjunction with *Ellerth*, these two companion cases support the adoption of a standard which imposes vicarious liability on an employer for the acts of supervisors only if that supervisor has, *at a minimum*, the authority to "make economic decisions affecting other employees." *Ellerth*, 524 U.S. at 762. This standard would include those supervisors with "virtually unchecked authority" over other employees. The *Parkins* test is therefore far and away more consistent with underlying common law principles relied upon in *Faragher* and *Ellerth*.

The overly broad *Mack* test, on the other hand, unnecessarily goes far beyond the agency principles undergirding *Ellerth* and *Faragher*. In *Mack*, the plaintiff, like the plaintiff in *Faragher*, worked at a remote location where only one mechanic – Connelly – was in charge of her employment. The *Mack* court, like the lower courts in *Faragher*, decided that Connolly was invested

with a particularly "special dominance" primarily due to the remoteness of the job site and the fact that there were no supervisors at the job site who could have "checked" his behavior. *Mack*, 326 F.3d at 125.

The unique workplace circumstances in the factual context of the seniority-driven remote job site location in *Mack* are very similar to the unique facts of the paramilitary organization and remote job site in *Faragher*. The Second Circuit, then, needed only to hold that the mechanic's special dominance over Mack's work due to the remoteness of the job site and the lack of any supervisory "check" on her harasser's conduct or authority was analogous to the "virtually unchecked authority" found in *Faragher*. Thus, there was no need for the Second Circuit to exponentially expand the definition of a common law supervisor/agent to employees never recognized as such. Instead, the Second Circuit needed only to hold that the unchecked "special dominance" of a single senior employee at a remote job site (without a manager present) was the very rare type of "virtually unchecked authority" that *Faragher* made clear rose to the level of supervisor/agent.

5. Petitioner's Misplaced Reliance on Non-*Faragher/Ellerth* Precedents of The Court Undermines Her Argument For the Second Circuit's Mack Test

Twice in Petitioner's Brief, she relies upon this Court's decision in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006);

both times her reliance totally misses the mark for the present supervisor/agent standard before the Court. In *Burlington Northern*, this Court addressed a totally separate provision of Title VII – the retaliation provision in Section 704 – which the Court distinguished from Section 703's substantive discrimination provision. Significantly, nowhere in *Burlington Northern* did the Court address *any* matters related to who was a supervisor for harassment liability. Indeed, Justice Souter, writing for the majority, rejected one parties' attempted reliance upon *Ellerth*, aptly noting that *Ellerth* had not "mention[ed] Title VII's antiretaliation provision at all." *Id.* at 65. That same observation distinguishes, in this case, any coincidental, generic use of "supervisor" in the Court's later decision. Likewise, Petitioner's attempted analysis of what was not included about Joiner's or Sharkey's employment "powers" provides no logical comparison in the present case because in *Burlington Northern* there was no issue involving those employee's supervisor status under *Meritor* or *Faragher/Ellerth*.

Petitioner also relies on *Staub v. Proctor Hospital*, 131 S. Ct 1186 (2011), where the question before the Court was unrelated to any analysis of a supervisor's status under Title VII. Indeed, in *Staub*, the challenged employment action was a discharge, a decision made by a Human Resource Vice President, but influenced by a subordinate supervisor. *Id.* at 1189-90. More importantly, this Court's analysis in *Staub* focused on "causation" for an adverse employment action, not upon any agency analysis under *Meritor* or *Faragher/Ellerth*.

Petitioner next attempts to compare the distinct statutory definition of supervisor under the

National Labor Relations Act ("NLRA") to the court's common law principles it separately applies to Title VII under *Meritor* and *Faragher/Ellerth*. (Petitioner's Brief at 26.) These different analyses are not surprising to observers of this Court. It bears noting that, if definitions of supervisor under the NLRA – a statute which has existed since far into the prior century – had any meaningful interpretive value for Title VII's underlying agency principles, it seems likely that this Court would have long ago drawn such comparisons in prior precedent, including, for example, *Meritor* and/or *Faragher/Ellerth*. Indeed, Petitioner's Brief notes a major difference between these dissimilar statutes; i.e., that "Congress had forbidden the NLRB from limiting supervisor status . . ." (Petitioner's Brief at 28) (citing *NLRB v. Kentucky River Cmty. Care., Inc.*, 532 U.S. 706, 719 (2001)). Since there has been no comparable Congressional action involving this Court's treatment of "supervisor" under Title VII's definition of an "employer's agent," it seems likely that this Court's different analysis of supervisor status under Title VII is fully compatible with Congress' different purposes for the NLRA.

Finally, in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), the issue before the Court was whether Title VII's prohibition of sex discrimination in the workplace applied to same-sex harassment. The Court's decision focused on the statutory interpretation of Title VII's "because of . . . sex" requirement, *id.* at 78; it did not attempt to analyze any employee's supervisor authority under *Faragher* or *Ellerth*. Again, Petitioner proffers a decision of this Court that does not address the question in this case.

In sum, Petitioner's attempted reliance on these Supreme Court decisions provides no support for what she needs to accomplish in this case; i.e., convince this Court that *Mack*'s unbridled standard for vicarious employer liability is supported by this Court's earlier common law principles in *Faragher* and *Ellerth*. For the reasons noted above, Petitioner cannot do so.

D. Alternatively, this Court Should Create a Narrow Exception to the *Parkins* Test by Recognizing that a Harassing Employee in a Remote Worksite with Unchecked Authority over Employees is a Supervisor/Agent Under Title VII

For the reasons set forth above, this Court should adopt the *Parkins* test as the appropriate standard for determining who is a supervisor/agent for purposes of Title VII. If, however, this Court decides to add to its *Faragher/Ellerth* decisions, the better approach is to simply recognize a very narrow, limited exception to this Court's *Faragher/Ellerth* decisions. This exception, based on the unique facts common to both *Faragher* and *Mack*, would apply in situations where an employee who lacks the formal authority to make tangible employment actions nevertheless exercises "virtually unchecked authority" over employees in a remote worksite where higher supervisors are absent. This limited exception would remain consistent with *Meritor*, *Faragher*, and *Ellerth* because it focuses on whether the supervisor possessed special authority over subordinate employees because of the employer's

abdication of supervision; special authority which may create an agency relationship warranting vicarious liability.

Such an exception would not affirm the Second Circuit's decision in *Mack*, because it would not expand the application of vicarious liability on those employees who merely oversee another's daily activities; a class of employees who have never been recognized as agents under the common law of agency or this Court's prior precedent. Instead, it would simply explain that while the standard adopted by the Second Circuit in *Mack* was incorrect, the result on the unique facts in that case can be found compatible with *Faragher/Ellerth*.

CONCLUSION

For the foregoing reasons, NRF respectfully requests that this Court adopt the reasoning of the *Parkins* test and hold that vicarious liability will only be applied to the actions of those supervisors who have the ability to make tangible employment decisions.

Respectfully submitted on October 26, 2012.

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AMICUS CURIAE BRIEF

No. 11-556

In the

Supreme Court of the United States

MAETTA VANCE,

Petitioner,

v.

BALL STATE UNIVERSITY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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October 26, 2012

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INTEREST OF AMICUS CURIAE

New England Legal Foundation ("NELF") seeks to present its views, and the views of its supporters, on the issue of who is a supervisor under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e - 2000e-3, for purposes of imputing vicarious liability to an employer when an employee has created an actionable hostile work environment. While NELF does not in any way condone discrimination in the workplace, NELF nonetheless believes that justice requires clarity, uniformity, and predictability in determining the scope of an employer's liability under federal anti-discrimination law.[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than amicus, made a monetary contribution to the preparation or submission of the brief. Pursuant to Supreme Court Rule 37.3, amicus notes that on July 26, 2012, and on August 1, 2012, counsel for respondent and counsel for petitioner respectively filed a blanket consent to the filing of amicus curiae briefs, in support of either or neither party.

and supporters include both large and small businesses located primarily in the New England region.

NELF has long been committed to a reasonable and balanced interpretation of federal statutes regulating the conduct of businesses in their capacity as employers. In this case, NELF opposes an unduly expansive and open-ended definition of the term supervisor for purposes of imputing vicarious liability to the employer in Title VII hostile work environment claims. In NELF's view, this Court in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), already has effectively defined the term "supervisor" to include only those employees who are empowered to take "tangible employment action" against a subordinate employee. NELF believes that, under this Court's precedent and sound principles of agency law, the imposition of vicarious liability on the employer in a hostile work environment claim is justified only when the harassing employee has been delegated this official and weighty corporate power to change the economic status of a subordinate employee.

NELF has regularly appeared as amicus curiae in this Court in cases raising issues of general economic significance to both the New England and the national business communities.[2] This is such a case, and NELF

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[2] *See, e.g.*, *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct.

believes that its brief would provide an additional perspective to aid this Court in deciding the issue presented herein.

SUMMARY OF ARGUMENT

In *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), this Court held that an employer is vicariously liable under Title VII for a supervisor's actionable harassment of an employee under his or her authority. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. This Court did not expressly define the operative term "supervisor" in those cases. Nevertheless, a careful reading of *Ellerth* strongly indicates that the Court intended the term to apply only to those employees who have been delegated the official corporate power to take "tangible employment action" against a subordinate employee, which entails "a

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1740 (2011); *Hall Street Assocs., L.L.C., v. Mattel, Inc.*, 552 U.S. 576 (2008); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007); *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007); *Rapanos v. United States*, 547 U.S. 715 (2006); *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370 (2006); *Kelo v. City of New London*, 545 U.S. 469 (2005); *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005); *Comm'r v. Banks*, 543 U.S. 426 (2005); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S. at 761.

From the outset, the Court in *Ellerth* expressed concern about the potentially broad scope of the foundational "aided by the agency relation" standard of vicarious liability, *Restatement (Second) of Agency* § 219(2)(d), as applied to Title VII claims. To avoid creating an employer's potentially unlimited vicarious liability for hostile work environment claims, and to impose reasonable limits, the Court required additional indicia of the agency relation, beyond the mere fact of the employment relationship itself. Among other things, the Court in *Ellerth* limited instances of indefensible, *per-se* vicarious liability to supervisory harassment that culminates in a tangible employment action (often referred to as "quid pro quo" claims).

In its subsequent discussion of hostile work environment claims, the Court in *Ellerth* incorporated its discussion of tangible employment actions and recognized that the power and authority to take such official and weighty action is a uniquely coercive form of hierarchical power, and that it is the defining feature of all supervisors. That is, the Court in *Ellerth* recognized that the employer has

specially "deputized" all supervisors with the rare power to terminate or substantially change an employee's economic status or job responsibilities. Consequently, supervisory harassment derives its inherently intimidating character from the supervisor's potential abuse of this official power. Hence, because of this delegated power, all supervisors are potentially and uniquely aided by the agency relation in creating a hostile work environment. This defining power of all supervisors, in turn, provides the necessary basis for imposing *prima facie* vicarious liability on the employer for actionable supervisory harassment, subject to the employer's two-pronged affirmative defense that (a) it exercised reasonable care in generally preventing and correcting workplace harassment, and that (b) the plaintiff failed unreasonably to make use of any such preventive or corrective measures.

Conversely, *Ellerth* also established that an employee who *lacks* the official corporate power to take tangible employment action against another employee is a coworker for Title VII purposes. A coworker cannot threaten or intimidate another employee with his or her very job or inflict other similar economic deprivations. As *Ellerth* established, the employer should only be vicariously liable for the harassment committed by a supervisor, who is uniquely empowered to take a tangible employment action against the plaintiff employee.

ARGUMENT

I. THIS COURT ALREADY HAS EFFECTIVELY DECIDED THAT A SUPERVISOR FOR TITLE VII PURPOSES IS AN EMPLOYEE WHO IS EMPOWERED TO TAKE A TANGIBLE EMPLOYMENT ACTION AGAINST A SUBORDINATE EMPLOYEE.

At issue in this case is who is a supervisor under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, for purposes of imputing vicarious liability to the employer for an employee's creation of an actionable hostile work environment.[3] In the twin cases of *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), this Court held that an employer is vicariously liable under Title VII for a supervisor's actionable harassment of an employee under his or her authority. *Faragher*, 524 U.S. at 807; *Ellerth*,

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[3] Title VII subjects employers to liability for the actionable discrimination of their agents. *See* 42 U.S.C. § 2000e(b) (defining "employer," in relevant part, as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . , *and any agent* of such a person . . . .") (emphasis added); 42 U.S.C. § 2000e-2(a)(1) ("It shall be an unlawful employment practice for an *employer* to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . .") (emphasis added).

524 U.S. at 765.[4]

This case arises because the Court did not expressly define the operative term "supervisor" in either opinion. However, a careful reading of *Ellerth* strongly indicates that the Court intended the term to apply only to those employees who have been delegated the official corporate power to take "tangible employment action" against a subordinate employee, which entails "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S. at 761. Under this definition of supervisor, the disputed employee in this case clearly cannot be the petitioner's supervisor for Title VII purposes because she had no such power and authority over the plaintiff's economic status. *See Vance v. Ball State Univ.*, 646 F.3d 461, 470 (7th Cir. 2011).

In *Ellerth*, this Court explained that, while an employee's act of discriminatory harassment is outside the scope of his or her employment, the employer can nevertheless be

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[4] By contrast, when the harasser is the plaintiff's coworker, and not her supervisor, the employer is not vicariously liable for the coworker's harassment. Instead, the plaintiff must prove that the employer was independently negligent in its response to the alleged harassment. *See Faragher*, 524 U.S. at 799; *Ellerth*, 524 U.S. at 760.

held vicariously liable based on the principle of agency law that the employee was "aided by the agency relation" in committing the harassment. *Ellerth*, 524 U.S. at 758 (quoting *Restatement (Second) of Agency* § 219(2)(d)) ("A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless . . . [the servant] was *aided in accomplishing the tort by the existence of the agency relation.*")) (emphasis added). *See also Faragher*, 524 U.S. at 801-02 (discussing same).

However, from the outset, the Court in *Ellerth* expressed concern about the potentially broad scope of the "aided by the agency relation" standard of vicarious liability as applied to Title VII claims. *See Ellerth*, 524 U.S. at 760 ("In a sense, most workplace tortfeasors are aided in accomplishing their tortious objective by the existence of the agency relation: Proximity and regular contact may afford a captive pool of potential victims."). To avoid creating an employer's potentially unlimited vicarious liability for hostile work environment claims, and to impose reasonable limits, the Court required additional indicia of the agency relation, beyond the mere fact of the employment relationship itself. *See id.* at 760 ("The aided in the agency relation standard, therefore, requires the existence of something more than the employment relation itself.").

First, the Court restricted application of the aided-by-the-agency-relation standard to

instances of *supervisory* harassment only, thereby excluding coworker harassment as a basis of vicarious liability. *See Ellerth*, 524 U.S. at 760. Second, the Court in *Ellerth* stated that precedent compelled it to interpret the scope of the aided-by-the-agency-relation standard narrowly when applied to supervisory harassment. *See id.* at 763 ("[W]e are bound by our holding in *Meritor* [*Sav. Bank, FSB v. Vinson,* 477 U.S. 57, 72 (1986),] that agency principles *constrain* the imposition of vicarious liability in cases of supervisory harassment.") (emphasis added). *See also Ellerth*, 524 U.S. at 763 ("'Congress' decision to define 'employer' to include any 'agent' of an employer, 42 U.S.C. § 2000e(b), surely evinces *an intent to place some limits* on the acts of employees for which employers under Title VII are to be held responsible'") (quoting *Meritor*, 477 U.S. at 72) (emphasis added). And finally, the Court in *Ellerth* further narrowed the scope of the aided-by-the-agency-relation standard by limiting instances of indefensible, *per-se* vicarious liability to supervisory harassment that culminates in a tangible employment action. *See Ellerth*, 524 U.S. at 760-61.[5]

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[5] By contrast, when a supervisor creates a hostile work environment but takes no tangible employment action, the employer is *prima facie* vicariously liable but can avoid liability by proving the two-pronged affirmative defense that (a) it exercised reasonable care in generally preventing and correcting workplace harassment, and that (b) the plaintiff failed unreasonably to make use of

Ellerth's thorough discussion of this last point--tangible employment actions--warrants close attention. As NELF discusses further below, this Court recognized that the power and authority to take such official action is the defining feature of all supervisors, and hence the necessary basis for an employer's vicarious liability under the aided-by-the-agency-relation standard. *See Ellerth*, 524 U.S. at 763.

In *Ellerth*, the Court observed that a tangible employment action is a uniquely coercive form of hierarchical power because "in most cases [it] inflicts *direct economic harm*." *Ellerth*, 524 U.S. at 762 (emphasis added). The Court also recognized that a tangible employment action is an official and weighty corporate act, and that the corporation generally delegates this formal power exclusively to its supervisors:

> Tangible employment actions fall within the special province of the supervisor, . . . [who has] been *empowered* by the company as *a distinct class of agent to make economic decisions* affecting other employees under his or her control. Tangible employment actions are the means by which the supervisor brings the *official power of the enterprise to bear on subordinates*. A

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any such preventive or corrective measures. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

> tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors.

Ellerth, 524 U.S. at 762 (emphasis added). *See also id.* ("As a general proposition, *only a supervisor*, or other person acting with the *authority of the company*, can cause this sort of injury.") (emphasis added).

To be sure, this discussion of tangible employment actions addressed "quid pro quo" claims, in which the supervisor has actually taken such extreme measures against the plaintiff employee. Nevertheless, the Court in *Ellerth* incorporated the substance of this discussion into its subsequent treatment of hostile work environment claims. There, the Court stated that "a supervisor's *power and authority* invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor *always* is aided by the agency relation [in creating a hostile work environment]." *Ellerth*, 524 U.S. at 763 (emphasis added). The immediate antecedent to a supervisor's "power and authority" in this key quotation from *Ellerth* is the Court's discussion, above, of a supervisor's power and authority to take tangible employment actions. *See id.* at 762. As one court has astutely

observed, in interpreting the same language from *Ellerth*, "[w]hat 'power and authority' was the Court [in *Ellerth*] referring to as investing the supervisor's harassment with 'a particularly threatening character,' if not the supervisor's 'power and authority' to take 'tangible employment action' against the harassed employee?" *Joens v. John Morrell & Co.*, 243 F. Supp.2d 920, 935 (N.D. Iowa 2003), *aff'd*, 354 F.3d 938, 940 (8th Cir. 2004) (adopting district court's analysis of *Ellerth*).

This interpretation of *Ellerth* is reinforced later in the opinion, when the Court announced its test for vicarious liability. There, the Court restated its goal "to accommodate the agency principles of vicarious liability for harm caused by *misuse of supervisory authority* . . . ." *Ellerth*, 524 U.S. at 764 (emphasis added). Again, the reference here must be to the supervisor's misuse of the uniquely supervisory authority to take tangible employment action against a subordinate employee.

The internal consistency of the Court's opinion therefore indicates that *Ellerth* defined a supervisor as one who always has the power and authority to take a tangible employment action against a subordinate employee. That is, *Ellerth* recognized that the employer has specially "deputized" all supervisors with the rare power to terminate or substantially change an employee's economic status or job

responsibilities. Consequently, supervisory harassment derives its inherently intimidating character from the supervisor's potential abuse of this official power. Hence, because of this delegated power, all supervisors are potentially and uniquely aided by the agency relation in creating a hostile work environment. This defining power of all supervisors, in turn, provides the necessary basis for imposing *prima facie* vicarious liability on the employer for actionable supervisory harassment, subject to the employer's two-pronged affirmative defense. *See Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. *See also* n.5, above.

In sum, *Ellerth* established that the definition of a supervisor for Title VII claims is restricted to those employees who are empowered to take a tangible employment action against a subordinate employee. *See Ellerth*, 524 U.S. at 763. Conversely, *Ellerth* also established that an employee who *lacks* the official corporate power to take tangible employment action against another employee is a coworker for Title VII purposes. After all, a coworker cannot threaten or intimidate another employee with his or her very job or inflict other similar economic deprivations. The employer has not empowered the coworker with that uniquely supervisory authority. The employer has therefore not "invest[ed] his or her harassing conduct with a particular threatening character" that can satisfy the aided-by-the-agency-relation standard. *Id.* at

763.

While a coworker can inflict harm on another employee and can indeed make his or her work environment a trying experience,

> [w]hen [by contrast,] a person with supervisory authority discriminates in the terms and conditions of subordinates' employment, his actions necessarily draw upon his superior position . . . . [A]n employee generally cannot check a supervisor's abusive conduct the same way that she might deal with abuse from a co-worker.

Faragher, 524 U.S. at 803. A coworker may even have some degree of control over another employee, but the employer should only be vicariously liable for the harassment committed by a supervisor, who is uniquely empowered to take the most extreme, economic action against a subordinate employee--a tangible employment action.

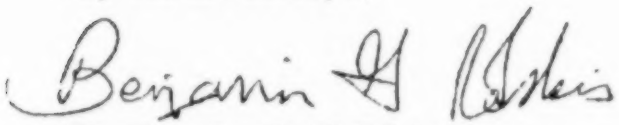
CONCLUSION

For the reasons stated above, NELF respectfully requests that this Court affirm the judgment of the Seventh Circuit.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION

By its attorneys,



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October 26, 2012

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-556

In the Supreme Court of the United States

MAETTA VANCE, PETITIONER

v.

BALL STATE UNIVERSITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT AND THE COLLEGE AND UNIVERSITY PROFESSIONAL ASSOCIATION FOR HUMAN RESOURCES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether an employer may be held vicariously liable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, when the agency relationship between the employer and the alleged harasser did not assist the alleged harasser in creating a hostile work environment.

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INTEREST OF *AMICI CURIAE*

Amicus curiae the Society for Human Resource Management (SHRM) is the world's largest association devoted to human resources management. SHRM represents over 250,000 human resources professionals who make up its membership. The purposes of SHRM, as set forth in its bylaws, are to promote the use of sound and ethical human resources management practices in the profession, and to (a) be a recognized world leader in human resources management; (b) provide high-quality, dynamic, and responsive programs and service to its customers with interests in human resources management; (c) be the voice of the profession on human resources management issues; (d) facilitate the development and guide the direction of the human resources profession; and (e) establish, monitor, and update standards for the profession. Founded in 1948, SHRM currently has more than 575 affiliated chapters within the United States and members in more than 140 countries.[1]

Amicus curiae the College and University Professional Association for Human Resources (CUPA-HR) serves as the voice of human resources in higher education, representing more than 15,000 human resources professionals at over 1,800 colleges and

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[1] No counsel for a party authored this brief in whole or in part. No person other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner and respondent have filed letters with the Clerk granting blanket consent to the filing of *amicus* briefs.

universities across the country, including 92 percent of all United States doctoral institutions, 75 percent of all master's institutions, 60 percent of all bachelor's institutions, and nearly 600 two-year and specialized institutions. Higher education employs over 3.7 million workers nationwide, with colleges and universities in all 50 States.

SHRM, CUPA-HR, and their respective members have a substantial interest in the outcome of this case. Human resources professionals perform a vital function in helping to ensure that employers comply with Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex, and national origin. 42 U.S.C. § 2000e-2(a). Among other things, human resources professionals develop policies, conduct employee training, and administer effective reporting mechanisms to prevent workplace discrimination. If problems arise, human resources professionals are often responsible for conducting orderly investigations and, where appropriate, taking corrective action. In short, human resources professionals serve on the frontlines of combating workplace discrimination in all its forms.

The Court has held that an employee may establish a Title VII violation by proving that discrimination in the workplace created a hostile work environment. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986). In *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998), the Court found that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor

with immediate (or successively higher) authority over the employee."

Although the Court did not define what qualifies an individual as a "supervisor" for purposes of imposing vicarious liability, a finding of supervisory status has significant consequences for employers. In cases of harassment by co-workers instead of supervisors, the plaintiff must prove that the employer was itself negligent in that it knew or reasonably should have known about the harassment and failed to stop it. *Ellerth*, 524 U.S. at 766. That requirement is not imposed on plaintiffs in cases involving supervisors. Instead, an employer may be held vicariously liable for the conduct of supervisors under certain circumstances.

Even if supervisory status is established, the legal standard for imposing vicarious liability varies depending on whether a "tangible employment action" was taken against the employee. *See id.* at 761 (defining a "tangible employment action" as a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits"). If no tangible employment action was taken, the employer may assert an affirmative defense with two elements: (1) "that the employer exercised reasonable care to prevent and correct promptly any harassing behavior," and (2) "that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.* at 765. The affirmative defense is unavailable where a tangible employment action was taken against the employee. *Id.*

The power to identify supervisory status is also important to human resources professionals. For a variety of reasons, including possible vicarious liability for workplace harassment, human resources professionals apply stricter standards when screening candidates for supervisory positions. Human resources professionals often help ensure that supervisors receive additional training commensurate with their level of authority and ability to bind the organization.

SUMMARY OF ARGUMENT

In this case, petitioner Maetta Vance sued respondent Ball State University, claiming that she was subjected to a racially hostile work environment while working in Ball State's catering department. In affirming the district court's grant of summary judgment in favor of Ball State, the United States Court of Appeals for the Seventh Circuit held that no question of material fact existed that Saundra Davis, who Vance alleged was a "supervisor" responsible for creating a racially hostile work environment, was a co-worker of Vance and not a supervisor. Pet. App. 11a-14a. The Seventh Circuit based its decision on the fact that Vance failed to produce any evidence that Davis had the authority to hire, fire, demote, promote, transfer, or discipline any employee, let alone Vance. Pet. App. 12a-13a. Treating Davis under the negligence standard for co-worker harassment, the Seventh Circuit found that Ball State was not directly liable for Davis's alleged conduct because Ball State promptly investigated each of Vance's complaints and took disciplinary action when appropriate. Pet. App. 15a-16a.

The Seventh Circuit's judgment should be affirmed for two reasons in addition to those stated in Ball State's brief.

First, the logical foundation for imposing vicarious liability under Title VII is missing from this case. In crafting the vicarious liability rule of *Ellerth* and *Faragher*, the Court based its analysis on Restatement (Second) of Agency § 219(2)(d) (1958), which provides that an employer is subject to liability for the torts of an employee acting outside the scope of his or her employment if the employee "was aided in accomplishing the tort by the existence of the agency relation." No credible argument can be made that the agency relationship between Ball State and Davis aided Davis in harassing Vance. Ball State did not give Davis any meaningful authority *vis-à-vis* Vance, let alone authority that was abused by Davis to create a hostile work environment. Nor was there ever any threat (explicit or implicit) that any authority given to Davis by Ball State would be abused if Vance complained to her actual supervisors. Instead, the record demonstrates that Vance and Davis treated each other as co-workers, a conclusion bolstered by Vance's own willingness to complain to her actual supervisors regarding Davis's alleged conduct.

Second, the Equal Employment Opportunity Commission's Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors (EEOC Guidance), Pet. App. 81a-93a, is not entitled to judicial deference under the "power to persuade" standard of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). In relevant part, the EEOC Guidance claims that merely having the intermittent authority to direct another employee's daily work

activities makes a person a "supervisor" sufficient to trigger the vicarious liability rule of *Ellerth* and *Faragher*. Importantly, however, the EEOC Guidance bases its assertion, not on an interpretation of Title VII's language, but on an interpretation of the Court's decision in *Faragher*. Agency interpretations of judicial precedent are not entitled to any level of deference, for the interpretation of judicial precedent is quintessentially a judicial function. Even if *Skidmore* deference applied, the EEOC Guidance does not have the power to persuade because it disregards essential facts from *Faragher*, including that the harasser in question had virtually unchecked authority over his victim, directly controlling and supervising all aspects of her day-to-day activities in a work environment completely isolated from higher management. Those facts are not present in this case.

ARGUMENT

I. THE LOGICAL FOUNDATION FOR IMPOSING VICARIOUS LIABILITY UNDER TITLE VII IS MISSING FROM THIS CASE

A. The Rule of Vicarious Liability Established by *Ellerth* and *Faragher* Is Based on the Restatement (Second) of Agency's "Aided in Accomplishing" Standard

Ellerth and *Faragher* were decided on the same day and repeat the same holding. *Compare Ellerth*, 524 U.S. at 765, *with Faragher*, 524 U.S. at 807. That holding is derived from Restatement (Second) of Agency § 219(2)(d). *Compare Ellerth*, 524 U.S. at 760-63, *with Faragher*, 524 U.S. at 801-03. In relevant part, § 219(2)(d) provides that an employer is

vicariously liable for the torts of an employee acting outside the scope of his or her employment if the employee "was aided in accomplishing the tort by the existence of the agency relation."

In *Faragher*, for example, the victim of harassment argued that the agency relationship between her employer and her two male harassers aided the harassers in creating a sexually hostile work environment. 524 U.S. at 801. Supervisors, she asserted, "can abuse their authority to keep subordinates in their presence while they make offensive statements, and that they implicitly threaten to misuse their supervisory powers to deter any resistance or complaint." *Id.* That, in turn, enabled the two harassers to "act for so long without provoking defiance or complaint." *Id.*

The Court agreed, finding that the Restatement's "aided in accomplishing" standard provides an appropriate starting point to determine vicarious liability under Title VII. *Faragher*, 524 U.S. at 802. "In a sense," the Court explained, "most workplace tortfeasors are aided in accomplishing their tortious objective by the existence of the agency relation: Proximity and regular contact may afford a captive pool of potential victims." *Ellerth*, 524 U.S. at 760. However, proximity and regular contact were not enough to satisfy the "aided in accomplishing" standard. Instead, the Court found that the standard "requires the existence of something more than the employment relation itself." *Id.* As the Court explained in *Faragher*:

> When a person with supervisory authority discriminates in the terms and conditions of subordinates' employment, his actions necessarily draw

> upon his superior position over the people who report to him, or those under them, whereas an employee generally cannot check a supervisor's abusive conduct the same way that she might deal with abuse from a co-worker. When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor . . . .

Id. at 803.

The Court identified the class of cases in which the "aided in accomplishing" standard is always satisfied: "when a supervisor takes a tangible employment action against the subordinate." *Ellerth*, 524 U.S. at 760. In those cases, "there is assurance the injury could not have been inflicted absent the agency relation." *Id.* at 761-62. "Tangible employment actions fall within the special province of the supervisor. The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control." *Id.* at 762. Therefore, a "tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer." *Id.*

The Court found it "less obvious" whether the "agency relation aids in commission of supervisor harassment which does not culminate in a tangible employment action . . . ." *Id.* at 763. "On the one hand, a supervisor's power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor always is aided by the agency relation. . . . On the other hand, there are acts of harassment a supervisor might commit which might be the same acts a coemployee would commit, and there may be some cir-

cumstances where the supervisor's status makes little difference." *Id.*[2]

B. No Credible Argument Can Be Made That the Agency Relationship Between Ball State and Davis Aided Davis in Allegedly Creating a Hostile Work Environment

As Vance recognizes, the "primary concerns that led to vicarious employer liability for harassment by supervisors" are that "such workplace misconduct is aided by the agency relation, which affords supervisors contact with their victims and makes it more difficult for targets to 'walk away' from or 'blow the whistle' on those who harass them . . . ." Pet. Br. 16. The record in this case, however, demonstrates that no aspect of the agency relationship between Ball State and Davis—other than the mere fact that Davis was employed by Ball State, which placed Davis in physical proximity to Vance—aided Davis in

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[2] The Restatement's authors omitted the "aided in accomplishing" standard eight years after *Ellerth* and *Faragher* were decided. *See* 2 Restatement (Third) of Agency § 7.08 cmt. b at 228 (2006) ("This Restatement does not include 'aided in accomplishing' as a distinct basis for an employer's (or principal's) vicarious liability. The purposes likely intended to be met by the 'aided in accomplishing' basis are satisfied by a more fully elaborated treatment of apparent authority and by the duty of reasonable care that a principal owes to third parties with whom it interacts through employees and other agents."). At the time, the Restatement's authors explained that an employer's liability for an employee's tortious conduct toward another employee was a topic being considered for inclusion in the Restatement (Third) of Employment Law, *see* 2 Restatement (Third) of Agency § 7.07 cmt. a at 199, a final version of which has not yet been published.

allegedly creating a hostile work environment. For example, the record contains no evidence that Davis threatened Vance, either explicitly or implicitly, with the abuse of any authority Ball State allegedly gave Davis. Nor is there any evidence that the conduct Vance alleges is "supervisory" is the type of conduct a human resources professional would be called upon to approve or disapprove on behalf of the employer.

The record also reflects that Vance had no trouble complaining to her actual supervisors regarding Davis's alleged conduct. *See, e.g.*, J.A. 21-26 (Ball State's internal investigation form related to incident in elevator where Davis allegedly threatened to strike Vance), 44-47 (formal written complaint filed by Vance with Ball State's compliance office regarding same). In other words, Davis's alleged supervisory status made little difference in their relationship, as Vance had no trouble telling Davis "where to go" and vice versa. *See, e.g.*, J.A. 23-26 (describing conflicting allegations that Vance and Davis exchanged insults); *see also Mikels v. City of Durham*, 183 F.3d 323, 334 (4th Cir. 1999) ("[W]here the level of authority had by a harasser over a victim—hence her special vulnerability to his harassment—is ambiguous, the tip-off may well be in her response to it. Does she feel free to 'walk away and tell the offender where to go,' or does she suffer the insufferable longer than she otherwise might?").

Vance's own equivocal answers as to whether she viewed Davis as a "supervisor" confirm that the authority Ball State allegedly gave Davis did not aid Davis in harassing Vance. *See* J.A. 197 (deposition testimony in which Vance stated "I don't know what she is" when asked whether Davis was a supervisor);

cf. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993) (explaining that to be actionable under Title VII, a sexually objectionable work environment must be both objectively and subjectively offensive, i.e., one that a reasonable person would find hostile or abusive, and one that the victim in fact perceived to be so). At most, the agency relationship between Ball State and Davis placed Davis in physical proximity to Vance, which is insufficient to satisfy the Restatement's "aided in accomplishing" standard. *Ellerth*, 524 U.S. at 760. It should also be insufficient to put the employer at risk for conduct that, without an internal complaint by the alleged victim, would not come to the attention of human resources professionals for investigation and appropriate remedial action.

Accordingly, the Seventh Circuit's judgment should be affirmed because the authority Ball State supposedly delegated to Davis in no way aided Davis in creating a hostile work environment.

II. THE EEOC GUIDANCE IS NOT ENTITLED TO *SKIDMORE* DEFERENCE

Acting as an *amicus curiae* in support of neither party, the United States argues at length that the Court should defer to the EEOC Guidance's definition of "supervisor" under the "power to persuade" standard of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *See* Br. of United States as *Amicus Curiae* 26-29 ("U.S. Br."); *see also* Br. of Nat'l Employment Lawyers Ass'n et al. as *Amici Curiae* 26-30 (repeating deference argument); Br. of Nat'l P'ship for Women & Families et al. as *Amici Curiae* 14 (same); Pet. Br. 47 n.12 (same). No deference is owed for two independent reasons. First, because the EEOC Guid-

ance's definition of "supervisor" is based on an interpretation of the Court's decision in *Faragher* and not on Title VII itself, the EEOC Guidance cannot qualify for *Skidmore* deference. Second, even if an agency interpretation of judicial precedent could qualify for *Skidmore* deference, the EEOC Guidance lacks the power to persuade because it misinterprets *Faragher*.

A. *Skidmore* Deference Does Not Apply to Agency Interpretations of Judicial Precedent

In relevant part, the EEOC Guidance asserts that a "supervisor" includes anyone who has the "authority to direct the employee's daily work activities." Pet. App. 90a. Importantly, however, that aspect of the EEOC Guidance is not based on an interpretation of statutory language. Title VII, after all, does not even use the word "supervisor," a fact expressly noted in the EEOC Guidance itself. *See* Pet. App. 88a ("The federal employment discrimination statutes do not contain or define the term 'supervisor.'").

Rather than being based on an interpretation of statutory language, the EEOC Guidance's "daily work activities" test is based on an interpretation of the Court's decision in *Faragher*. *See* Pet. App. 91a-92a. The EEOC admitted that fact when it rescinded certain regulations following the issuance of *Faragher* and *Ellerth*. *See* Final Rule, Sex Discrimination Guidelines and National Origin Discrimination Guidelines, 64 Fed. Reg. 58,333 (Oct. 29, 1999) (explaining, in the course of rescinding pre-*Faragher* and *Ellerth* regulations, that the EEOC Guidance "interpret[s] those decisions and explain[s] the circumstances under which employers are vicariously

liable for unlawful harassment by supervisors"); *see also* 29 C.F.R. § 1604.11 app. A (2012) (explaining that the EEOC Guidance "examines the *Faragher* and *Ellerth* decisions and provides detailed guidance on the issue of vicarious liability for harassment by supervisors"); U.S. Br. 10 (arguing that the EEOC "thoroughly considered the Court's decisions in *Faragher* and *Ellerth* in forming its position").[3]

The Court has held that agencies are entitled to judicial deference when they interpret ambiguous statutes Congress has entrusted the agencies to administer. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984); *Skidmore*, 323 U.S. at 140. The same is true when agencies interpret their own ambiguous regulations. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012); *Auer v. Robbins*, 519 U.S. 452, 461-62 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

At the same time, the Court has never condoned giving *any* level of deference to agency interpretations of judicial precedent. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706-07 (2012) (unanimously rejecting EEOC interpretation of Supreme Court precedent

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[3] At one point in its brief, the United States appears to suggest that the EEOC Guidance's "daily work activities" test constitutes an administrative interpretation of Title VII itself. *See* U.S. Br. 26 (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986)). An examination of the Guidance's plain language demonstrates that any such suggestion is incorrect, as the EEOC expressly based its test on an interpretation of *Faragher*. *See* Pet. App. 91a-92a.

without any indication such interpretations could qualify for judicial deference). Federal appellate courts have consistently rejected agencies' claims for deference under those circumstances. *See, e.g.*, *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1085 (D.C. Cir. 2001) ("We, of course, owe no deference to an agency's reading of judicial orders or decisions."); *New York v. Shalala*, 119 F.3d 175, 180 (2d Cir. 1997) ("[U]nlike an administrative action that requires significant expertise and entails the exercise of judgment grounded in policy concerns, an agency has no special competence or role in interpreting a judicial decision. . . . And certainly an agency is no better suited to interpret a judicial decision than the court that rendered it.") (internal brackets, quotation marks, and citations omitted); *Akins v. FEC*, 101 F.3d 731, 740 (D.C. Cir. 1996) (en banc) ("We are not obliged to defer to an agency's interpretation of Supreme Court precedent . . . . There is therefore no reason for courts—the supposed experts in analyzing judicial decisions—to defer to agency interpretations of the Court's opinions."), *vacated on other grounds*, 524 U.S. 11 (1998); *Blackburn v. Reich*, 79 F.3d 1375, 1377 n.3 (4th Cir. 1996) ("Because the [agency] based [its] decision in the instant case on judicial precedent rather than [its] own interpretation of the statute, we owe 'no more deference than we would any lower court's analysis of the law.'") (quoting *Thomas Hodgson & Sons, Inc. v. FERC*, 49 F.3d 822, 826 (1st Cir. 1995)).

As explained by one federal district court, there is "no law that supports the [agency's] position that an Article III judge must defer to an agency or department of the Executive Branch or the head of such an

agency or department . . . on interpretations of decisions of the United States Supreme Court; for that is quintessentially a judicial function." *Mudd v. Caldera*, 134 F. Supp. 2d 138, 144 (D.D.C. 2001); *accord Piersall v. Winter*, 507 F. Supp. 2d 23, 38 (D.D.C. 2007) (rejecting agency's claim for deference because the "interpretation of judicial decisions . . . falls foursquare in the bailiwick of the judiciary"); 1 Richard L. Pierce Jr., *Administrative Law Treatise* § 3.5 at 200 (5th ed. 2010) ("[C]ourts are at least as good as agencies at interpreting judicial opinions.").[4]

Tellingly, none of the decisions cited by the United States support the notion that the Court should give *Skidmore* deference to what is, in fact, an agency interpretation of judicial precedent. Instead, the cases cited by the United States involved agency interpretations of statutes or regulations. *See Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1335 (2011) (giving *Skidmore* deference to agency's statutory interpretation); *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) (giving same to agency's statutory and regulatory interpretations); *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156-57 (1991) (giving same to agency's regulatory interpretation); *Meritor*,

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[4] The Second Circuit's decision in *Mack v. Otis Elevator Co.*, 326 F.3d 116 (2003), is not to the contrary. In giving *Skidmore* deference to the EEOC Guidance's "daily work activities" test, the *Mack* court overlooked the fact that the test is based on the EEOC's interpretation of *Faragher*, not Title VII. *See id.* at 127. Had the *Mack* court considered that fact, circuit precedent would have dictated giving no deference to the EEOC Guidance. *See New York*, 119 F.3d at 180.

477 U.S. at 65 (giving same to agency's statutory interpretation); *Skidmore*, 323 U.S. at 140 (same). The other decisions cited by Vance's *amici* are to the same effect. *Compare Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 555 U.S. 271, 276 (2009) (giving deference to agency's statutory interpretation); *Penn. State Police v. Suders*, 542 U.S. 129, 142 (2004) (same); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433 (1971) (same), *with Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141-43 (1976) (refusing to give deference to agency's statutory interpretation).

It stands to reason that if the Court owes no deference to a lower court's interpretation of the Court's decisions, no deference is owed to an agency's interpretation of the Court's decisions. This is especially true in the Title VII context, where "Congress has left it *to the courts* to determine controlling agency law principles . . . ." *Ellerth*, 524 U.S. at 751 (emphasis added); *see also Gilbert*, 429 U.S. at 141 (explaining that Congress "did not confer upon the EEOC authority to promulgate [substantive] rules or regulations pursuant to" Title VII). It is the province of the Court and the Court alone to interpret its decisions, unfettered by whatever gloss an agency might give them.

B. The EEOC Guidance Lacks the Power to Persuade

Under *Skidmore*, an agency's interpretation is only given that "measure of deference proportional to the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *SmithKline*, 132 S.

Ct. at 2169 (internal quotation marks and citations omitted). Even if one assumed for the sake of argument that agency interpretations of judicial precedent could qualify for *Skidmore* deference, the EEOC Guidance should be rejected because it lacks the power to persuade.

Of particular relevance to this case, the EEOC Guidance asserts that a "supervisor" includes anyone who has the "authority to direct the employee's daily work activities." Pet. App. 90a. The EEOC Guidance reaches this conclusion by first observing that one of the two harassers in *Faragher* (David Silverman) was "responsible for making the [employees'] daily work assignments and supervising their work and fitness training." Pet. App. 91a. The EEOC Guidance then posits that there was "no question that the Court viewed [Silverman as a supervisor] even though [he] apparently lacked authority regarding tangible job decisions." Pet. App. 91a-92a. The EEOC Guidance therefore concludes that any employee who merely has the authority to direct another employee's daily work activities is that person's "supervisor" because having the authority to take or recommend tangible employment action is unnecessary. *See* Pet. App. 91a-92a.

The conclusion drawn by the EEOC's syllogism is flawed because it elevates to controlling status one characteristic from *Faragher*'s facts—that Silverman had the authority to direct employees' daily work activities—and disregards the case's remaining facts, including that Silverman was granted "virtually unchecked authority" over his subordinates, "directly controlling and supervising *all aspects* of [the plaintiff's] day-to-day activities." *Faragher*, 524 U.S. at

808 (internal quotation marks and citation omitted) (emphasis added). The Court also found it "clear" that the plaintiff in *Faragher* and her colleagues were "completely isolated from the [employer's] higher management," *id.* (internal quotation marks and citation omitted), which facilitated Silverman's ability to create a hostile work environment by abusing his near-total authority over the plaintiff, *see id.* at 780 (quoting Silverman as having told the plaintiff: "Date me or clean the toilets for a year.").

The EEOC Guidance's "daily work activities" test ignores these essential facts from *Faragher*, rendering the Guidance unpersuasive as an interpretation of judicial precedent. That the EEOC has been persistent in advocating its flawed interpretation of *Faragher*, *see* U.S. Br. 28 (citing EEOC *amicus* briefs filed in other cases), does not make the flawed interpretation any more valid.

Moreover, the EEOC Guidance's "daily work activities" test is extremely vague and unworkable in practice. For example, the EEOC Guidance asserts that "[a]n individual who is temporarily authorized to direct another employee's daily work activities qualifies as his or her supervisor during that time period." Pet. App. 92a. "On the other hand," the EEOC Guidance explains, "someone who merely relays other officials' instructions regarding work assignments and reports back to those officials does not have *true supervisory authority*." *Id.* (emphasis added). "Furthermore, someone who directs only a *limited number of tasks or assignments* would not qualify as a 'supervisor.' For example, an individual whose delegated authority is confined to coordinating a *work project of limited scope* is not a 'supervisor.'"

Id. (emphasis added); *see also* U.S. Br. 31 ("Nor would it be enough for [Vance] to show that Davis occasionally took the lead in the kitchen.").

The EEOC Guidance never explains what constitutes "true supervisory authority," a "limited number of tasks," and a "work project of limited scope." Thus, employers and their human resources professionals can only guess as to whether the authority given a particular employee qualifies him or her as a "supervisor" for purposes of vicarious liability under Title VII. However, because "[r]ecognition of employer liability when discriminatory misuse of supervisory authority alters the terms and conditions of a victim's employment is underscored by the fact that *the employer has a greater opportunity to guard against misconduct by supervisors than by common workers*," *Faragher*, 524 U.S. at 803 (emphasis added), employers and their human resources professionals should be able to identify supervisors with reasonable certainty. The "daily work activities" construct frustrates their ability to do so—especially when, in the real world, a co-worker without the power to take or effectively recommend a tangible employment action is not considered someone's "boss."

Many workplaces today bear no resemblance to the hierarchical structure at issue in *Faragher*. With increased focus on workplace flexibility, many organizations now assign "lead" employees on rotating projects. While these employees may oversee the work of others for a limited period of time, their ultimate status as co-workers has not changed. The "daily work activities" test, however, is so open-ended that only the lowest level of employees would be considered co-workers, rendering nearly everyone

in the workplace a "supervisor" whose conduct subjects the employer to potential vicarious liability. That, in turn, is contrary to *Faragher*, which found that imposing a heightened duty on employers to guard against supervisor misbehavior was reasonable because the number of supervisors is "by definition *fewer* than the numbers of regular employees." 524 U.S. at 801 (emphasis added).

More fundamentally, the EEOC Guidance focuses on the definition of "supervisor" as if the conduct of an employee who qualifies as a "supervisor" automatically triggers the vicarious liability rule of *Ellerth* and *Faragher*. That is incorrect. Regardless of whether an alleged "supervisor" has the authority to take tangible employment actions or the virtually unchecked authority to direct all daily work activities in an environment isolated from higher management, a plaintiff must still prove that the authority delegated by the employer to the alleged harasser actually aided the harasser in creating a hostile work environment. In other words, not all harassment by supervisory personnel renders an employer vicariously liable for the harassment. *See, e.g.*, *Mikels v. City of Durham*, 183 F.3d 323, 331 (4th Cir. 1999).

Accordingly, even if one assumed for the sake of argument that agency interpretations of judicial precedent could qualify for *Skidmore* deference, the EEOC Guidance's interpretation of *Faragher* and the resulting "daily work activities" test lacks the power to persuade and should be rejected.[5]

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[5] The United States recognizes that, despite substantial factual discovery, the record contains no evidence that Davis (continued)

CONCLUSION

For the reasons stated above and in Ball State's brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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satisfies the "daily work activities" test. U.S. Br. 30. Vance nonetheless argues that the Court should remand this case "for application of the correct legal standard to facts as developed with an eye to that standard." Pet. Br. 44. Even if the Court were to accept the "daily work activities" test, because there is no serious prospect that the test could be satisfied on remand, Ball State should not be subjected to the burden and expense of further litigation. *See Faragher*, 524 U.S. at 808 (declining to remand case for application of new legal standard because there was no "serious prospect" the new standard could be satisfied); *Mikels*, 183 F.3d at 334 (applying *Faragher*'s "no serious prospect" standard in refusing to remand action for application of correct legal standard because the record developed through substantial discovery demonstrated that the agency relationship between the employer and the alleged harasser did not aid the creation of a hostile work environment).